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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW ENGLAND NEWSPAPERS, INC.
d/b/a THE PAWTUCKET EVENING TIMES,
Petitioner,

v.

PAUL J. M. HEALEY, M.D.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a defamation action involving a matter of public concern, the First and Fourteenth Amendments prohibit an award of damages when the defendant has not published a false statement of fact.

2. Whether, in a defamation action involving a matter of public concern, the First and Fourteenth Amendments prohibit an award of punitive damages based on a jury finding of "actual malice" when the defendant neither intends nor is aware that its publication is susceptible of a false and defamatory implication.*

* Pursuant to S. Ct. R. 28.1, New England Newspapers, Inc. states that its parent corporation is Ingersoll Newspapers Inc. and that it does not have an affiliate or subsidiaries other than those that are wholly owned.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

Petitioner, New England Newspapers, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Rhode Island entered in this proceeding on March 3, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island is reported at 555 A.2d 321 and is reprinted in the Appendix hereto at 1a-14a. The decision of the Rhode Island Superior Court, Providence County (Gibney, J.), denying petitioner's motion for a directed verdict and for a new trial, is unreported and is included in the Appendix hereto at 15a-20a.

A previous, related opinion of the Supreme Court of Rhode Island is reported at 520 A.2d 147 and is reprinted in the Appendix hereto at 21a-32a. A related prior decision of the Rhode Island Superior Court, Providence County (Lagueux, J.), granting petitioner's motion for a directed verdict at the first trial of this case, is unreported and is reprinted in the Appendix hereto at 33a-38a.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on March 3, 1989. This Petition for a Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Fourteenth Amendment, Section 1, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Preliminary Statement

On June 3, 1987, a Rhode Island jury awarded $28,600 in compensatory damages and $250,000 in punitive damages in a defamation action instituted by Respondent Dr. Paul J. Healey ("Healey") against Petitioner New England Newspapers, Inc., the publisher of the Pawtucket *Evening Times* (collectively, "*The Evening Times*"), a daily newspaper of general circulation. The article at issue, which reported on an ongoing controversy of substantial local concern, contained no false statement. Nevertheless, the Rhode Island Supreme Court affirmed the jury's verdict, including its finding that an award of punitive damages was supported by a showing that the newspaper published with "actual malice."

The Rhode Island Supreme Court's decision reflects a sharp and increasingly dangerous conflict among the lower courts. The decision permits (1) the imposition of defamation liability in the absence of a showing of falsity by the plaintiff, and (2) an award of punitive damages in the absence of proof that the defendant *in fact* entertained serious doubts about the truth of its publication. Certiorari should be granted in this case because, if left undisturbed, the decision below will not only exacerbate the already demonstrable confusion in the lower courts, but will inflict a substantial financial penalty on constitutionally protected expression.

B. Statement of Facts

1. The Trial Court Evidence [1]

In early June 1980, the Pawtucket-Central Falls YMCA ("YMCA") announced the forced resignations of two popular longtime employees: James L. Greene, director of YMCA extension services, and Beverly Tillier, director of youth services. R. 63-64, 84.[2] The terminations sparked a storm of protest. R. 84-86.

For several weeks, the firings received virtually daily attention in Pawtucket. R. 63-64, 152-53, 257. *The Evening Times* published at least nine news reports and several letters to the editor about them. Exh. 1. These letters also criticized the general administration of the YMCA and suggested that its United Way funds were being mismanaged. *Id.*

One leading critic of the YMCA's management was Jerry Lampinski, founder of the YMCA's Darlington Plains outpost. R. 152-53, 393. In a letter published in *The Evening Times* on June 13, Lampinski called the firings "unbelievable" and threatened "to do something about it," including picketing the main YMCA facility and having the organization's funding cut off. *See* Exh. 1.

Esselton McNulty, the executive director of the YMCA's main facility, initially decided to seek the resignations of Greene and Tillier. R. 146-47. The decision was approved by the YMCA's personnel committee, but was subject to review by the organization's board of directors. R. 147, 156. Healey, a prominent Pawtucket surgeon and civic leader, chaired the board and served as

[1] This summary is based on the trial record and is limited to documentary and other tangible evidence, undisputed testimony, and Healey's own admissions. Where material facts were disputed at trial, such disputes are resolved in favor of Healey for purposes of this *Statement of the Case*.

[2] References to the trial transcript are denoted herein as "R."; references to trial exhibits are denoted as "Exh."; and references to the Appendix to this Petition are denoted as "App."

an *ex officio* member of the personnel committee. R. 68, 147. He publicly defended the terminations of Greene and Tillier. R. 76-77; Exh. 1.

The board scheduled a formal review of the firings for its meeting on June 23, 1980, at the MacColl Field YMCA branch. R. 30, 71. Concerned that protesters, particularly Mr. Lampinski, might disrupt the meeting, YMCA officials hired a security guard to be present. R. 30, 113, 537-40. In fact, when the meeting began in the physical fitness center, a group of picketers marched approximately 300 yards away, at the entrance to MacColl Field. R. 23, 110, 164-65.

When Healey, the meeting's chairman, called the roll of directors, Lampinski informed him that he was attending as a proxy for an absent board member. R. 104, 159, 192. Healey refused to honor the proxy and directed Lampinski to leave. *Id.* Lampinski protested the ejection but, red-faced, grudgingly agreed to leave. R. 161, 193-95, 566.

Immediately thereafter, Lampinski joined the picketers at the entrance to MacColl Field. R. 164, 304-05. He was visibly shaken and appeared angry and upset. R. 304-05, 596. Minutes later, he collapsed. *Id.* As bystanders came to Lampinski's side, Raymond Bergeron, one of the protesters, rushed to the meeting and approached the security guard[3] and then McNulty. R. 165, 468-69, 542. Bergeron told McNulty that Lampinski had collapsed, an ambulance had been called, and Lampinski was receiving first aid. R. 165-67. According to McNulty, Bergeron said that no assistance was needed.[4]

McNulty returned to the board meeting and summoned Frank Smith, another YMCA employee, who promptly

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[3] Bergeron testified that he asked the guard to go into the meeting to ask Healey or board member John Griffin, a paramedic and friend of Lampinski, for help. R. 598.

[4] R. 167. Bergeron testified that he did not tell McNulty that no assistance was needed, and denied that he said an ambulance had been called or that Lampinski was receiving assistance. R. 471, 489.

advised YMCA executive director Robert Bendl and Healey of Bergeron's statements. R. 167, 227-29. Healey asked Smith if he could be of any help; Smith told Healey that Lampinski was receiving first aid or cardiopulmonary resuscitation from an unidentified bystander, an ambulance was either on the scene or en route, and "everything was under control." R. 34, 228-29. It is undisputed that Healey did not interrupt the meeting, either to advise the other participants of Lampinski's collapse or to check personally on Lampinski's condition. R. 116, 119.

Twenty to thirty minutes later, Bergeron returned to the picketing site. R. 483. As he arrived, he saw an ambulance on its way to the hospital with Lampinski.[5] Following his return, Bergeron complained to *Evening Times* reporter Edward Gaulin that no one had left the board meeting to assist Lampinski or to check on his condition. R. 252.

After the meeting, Healey and several YMCA board and staff members gathered for a hot dog roast. R. 37. Upon its conclusion, Gaulin attempted to speak with Healey and Bendl, but Bendl indicated that they would not issue a statement until the following morning. R. 287, 440. When Healey returned home later that night, he called the hospital and was advised that Lampinski had died of a heart attack. R. 127-28.

On the morning of June 24, Bergeron contacted Gaulin and again criticized Healey for failing to react to Lampinski's collapse. R. 253, 314-15, 499-500. After attempting unsuccessfully to contact Healey, Gaulin spoke with McNulty, who said that Healey had not refused to assist Lampinski and advised Gaulin that "it would be

[5] R. 484. The ambulance had been summoned after Lampinski's collapse while several bystanders, including *Evening Times* reporter Edward Gaulin, who was present to report on the picketing and the board meeting, administered cardiopulmonary resuscitation. The ambulance arrived five to ten minutes later. R. 270-72, 302-04.

a big mistake to print that." R. 171. The final edition of *The Evening Times* on June 24 included, in its report of Lampinski's death, both Bergeron's criticism and McNulty's response.[6]

Also on June 24, two of Lampinski's sons, John and Jeffrey, investigated the circumstances surrounding their father's death. They spoke with Griffin, Bergeron, Smith, and the security guard, each of whom related his version of what had occurred. R. 373-76, 389. Bergeron told Lampinski's sons that, minutes after their father's collapse, Bergeron advised McNulty that an ambulance had been called, and that neither Griffin nor Healey left the meeting to render assistance. R. 386-87, 602. Smith, however, told the Lampinski sons that he had advised Healey that the ambulance had already taken Lampinski away. R. 375. Lampinski's sons concluded that Smith was lying. R. 376.

The following morning, Lampinski's sons went to *The Evening Times* to express their anger about what they had learned. R. 376, 392. John Lampinski complained to Gaulin that his family was angry because they believed Lampinski should have been given early attention by either a doctor or a paramedic at the board meeting. R. 393. Gaulin told Lampinski's sons that he was at MacColl Field at the time of Lampinski's collapse and that their father received first aid shortly thereafter. R. 399-400. He did not tell them that he had been an eyewitness to Lampinski's collapse, that Lampinski had received cardiopulmonary resuscitation within one minute of the collapse, or that the ambulance arrived within five to ten minutes. R. 377-79, 399-400. However, when they met with Gaulin, the sons were already aware that their father had received prompt assistance and that the ambulance had arrived within ten minutes after the collapse. *Id.*

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[6] App. 39a-43a. The jury found that this article was not defamatory and it is, therefore, no longer at issue. R. 654.

The Evening Times also interviewed Smith, who advised the newspaper of his recollection about what he had told Healey. R. 230-31. In addition, Gaulin telephoned Healey's office twice on the morning of June 25, but was unable to reach him. R. 317. Healey did not return the messages left by Gaulin. R. 320.

The June 25 editions of *The Evening Times* contained an article entitled "Lampinski sons angry at Y board," which is the only article at issue in this Court. It accurately reported that the Lampinski family had "expressed anger at the way their father was treated by the board," both in confiscating his agenda for the meeting and in evicting him from the session. App. 44a. In addition, the article reported that John Lampinski said he and his family are "angry because they feel Lampinski should have been given early attention by either a doctor or a paramedic at the board meeting" and stated, in the following paragraph, that "Dr. Paul J. Healey is Y president and was at the meeting when Lampinski collapsed." *Id.*

The article also reported that Lampinski collapsed some 200 yards away from the board meeting and that, at the time Bergeron first informed McNulty, "Lampinski was being given cardiopulmonary resuscitation . . . by a bystander who said he was a paramedic." App. 45a. Moreover, the article accurately set forth McNulty's statement that "Healey was informed that Lampinski had collapsed, an ambulance had been called and that persons at the scene were treating him." *Id.* It also reported Smith's statement to the newspaper that he had told Healey at the time that " 'the situation was well in hand and already being taken care of.' " *Id.* Finally, the article stated that "Smith took offense at any implication that either Healey or board members had been lax," and quoted Smith's assertion that " 'the accusation being made is false, the accusation that Dr. Healey knew something and didn't do anything.' " *Id.*

2. The Proceedings Below

The complaint in this defamation action was filed in September 1980 in the Rhode Island Superior Court, Providence County. The case was first tried to a jury commencing on April 8, 1984. At the close of the plaintiff's evidence, *The Evening Times* moved for a directed verdict, which was granted by the Honorable Ronald Lagueux, now a judge of the United States District Court for the District of Rhode Island. App. 15a.

Judge Lagueux ruled that neither the June 24 nor June 25 articles contained any false and defamatory statements of fact and that, therefore, they were not actionable in defamation. App. 17a-19a. He concluded that "[t]he Lampinskis had a right to express an opinion that under the circumstances Dr. Healey should have responded" and that *The Evening Times* "had a right to report" that opinion. App. 18a-19a. In the trial court's view:

> It is undisputed that Dr. Healey made a decision to continue the meeting and not adjourn or recess the meeting to go and investigate the facts for himself . . . . By virtue of making that decision he opened himself to criticism. There are many reasonable and right thinking people who would think under those circumstances that a doctor would adjourn such a meeting for a short period of time and go see for himself whether his aid was needed.

App. 17a. The trial court entered judgment for *The Evening Times*. App. 20a.

Healey appealed to the Rhode Island Supreme Court, which vacated the trial court's judgment and remanded the case for a new trial. App. 32a. The appellate court held that the reported criticisms of Healey could be read to imply certain undisclosed defamatory facts. App. 21a-32a.

The case was retried to a jury commencing on May 26, 1987. The trial court instructed the jury that it

could impose liability upon a finding of negligence. It further instructed the jury, however, that the imposition of punitive damages required a finding of "actual malice." Finally, over *The Evening Times*' objections, R. 642-44, the court instructed the jury that "[a]n opinion can be defamatory if the opinion assumes the existence of undisclosed defamatory facts that do not exist," R. 625, and added:

> If you find that the reporter had available to him facts that he failed to reveal, and the disclosure of these facts would have ensured that a reasonable person could not have construed the existing facts in a manner which reflected negatively on Dr. Healey, you may find that the defendant defamed the plaintiff.

R. 626.[7]

Although the jury found that the June 24 article was not actionable, it concluded that the June 25 article was defamatory. The jury awarded $28,600 in compensatory damages[8] and $250,000 in punitive damages. The trial court subsequently denied *The Evening Times*' motion for a directed verdict, on which decision had been reserved, and its motions for judgment notwithstanding the verdict or a new trial and entered judgment on the jury's verdict. App. 33a-38a.

3. The Decision Below

The Rhode Island Supreme Court affirmed the trial court's judgment. App. 14a. Although the court did not identify any false and defamatory statements of fact in the June 25 article, it held that a statement of opinion

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[7] Under Rhode Island law, a finding that a statement is defamatory necessarily includes a finding of falsity as well. App. 5a-6a n.1.

[8] Before reaching its verdict, the jury had asked the judge to inform it "how many papers were printed on June 25, 1980?" The trial judge replied that "the only evidence in the record is that the total circulation of the Pawtucket Evening Times on 6/24/80 was approximately 28,600." R. 647.

is actionable if "'it implies the allegation of undisclosed defamatory facts as the basis for the opinion.'" App. 6a (quoting *Restatement (Second) of Torts* § 566 (1977)). The court further held that, drawing "from the evidence only those inferences that support [Healey's] claim," App. 9a, the article could be understood to imply that "Lampinski collapsed at the board meeting, that plaintiff was requested to assist Lampinski and that plaintiff refused this request, and that there was ample time for plaintiff to render aid." App. 10a.

Although the court acknowledged that the article "does explain that Lampinski collapsed 200 yards from the board meeting, that Lampinski received CPR, and that several people at the board meeting disputed the negative implications created by the John Lampinski statement," it nevertheless held that "[t]he evidence could support a finding that defendant knew these implications were false or that it acted in reckless disregard of whether these implications were true or false by failing to disclose the firsthand information that would have dispelled the defamatory implications." *Id.* Specifically, the court concluded that *The Evening Times* had failed to report that "Gaulin was at the scene when Lampinski collapsed," that Gaulin assisted in giving Lampinski cardiopulmonary resuscitation, and that Gaulin "knew that an ambulance arrived at the scene within five to ten minutes of Lampinski's collapse." *Id.* According to the court, defamation liability was properly premised, not only upon "what was actually printed" by *The Evening Times*, but also upon "what was left unprinted." *Id.*

C. How Federal Question Raised

The constitutional issues raised herein were first addressed in *The Evening Times*' Answer to the Complaint, filed January 8, 1981. As the preceding discussion demonstrates, *The Evening Times* continued to

advance these issues, *inter alia*, in its successful motion for directed verdict at the first trial, App. 15a-20a, the initial appeal of this case to the Rhode Island Supreme Court, App. 21a-32a, its objections to the judge's charge to the jury, R. 642-44, its motions for a directed verdict, judgment notwithstanding the verdict, or for a new trial, R. 609-622, 656-69, which were adjudicated following the jury's verdict in the second trial, App. 33a-38a, and its appeal of the jury's verdict to the Rhode Island Supreme Court, App. 1a-14a. *See* S. Ct. R. 21.1(h).

REASONS FOR GRANTING THE WRIT

I. The Court Below Embraced A Constitutionally Deficient Standard For Identifying Nonactionable Expression

In the fifteen years since *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the courts of virtually every state and federal circuit have held that only false statements of fact are actionable in defamation suits involving matters of public concern. Whether the constitutional analysis is premised on *Gertz*'s admonition that "there is no such thing as a false idea," *id.* at 339, this Court's prior injunction against penalizing "rhetorical hyperbole," *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970), or its recent pronouncement that the plaintiff bears the burden of demonstrating factual falsity, *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), the lower courts have concluded that certain expression is, as a matter of constitutional law, nonactionable in defamation because it is not false.

This broad consensus literally dissolves, however, upon examination of the methods employed by the lower courts to identify this species of protected speech. Some courts, like the Rhode Island Supreme Court in the instant case, have looked to Section 566 of the *Restatement (Second) of Torts*, which purports to immunize "expressions of opinion" from defamation liability. Others have adopted

multi-factor tests designed to identify actionable statements of false facts. *See, e.g., Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). Still others purport to have combined some or all of these alternatives. *See, e.g., Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986) (en banc).

These various modes of analysis, all pursued in the name of the First Amendment, have produced markedly different results in similar cases. With increasing frequency and mounting frustration, lower courts and commentators have recognized that this untenable state of affairs—where the First Amendment means different things in different courthouses—will persist until this Court speaks to the issue. The instant case, in which application of the widely criticized *Restatement* formulation has resulted in the imposition of a $278,600 civil penalty on constitutionally protected expression, is an ideal vehicle for this Court to resolve these conflicts and doctrinal confusion.

A. Only False Statements Of Fact Are Constitutionally Actionable As Defamation

In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. at 768-69, and *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988), this Court removed any lingering doubt that only false statements of fact are actionable in defamation suits involving speech of public concern. Even a "private-figure plaintiff," the Court held in *Hepps*, "cannot recover damages without also showing that the statements at issue are false." 475 U.S. at 768-69. In *Falwell*, the Court held that a parody was constitutionally protected precisely because the plaintiff could not demonstrate that it "contains a false statement of fact." 108 S. Ct. at 882. Indeed, in *Falwell*, the Court rejected the plaintiff's contention that "it is of no constitutional import whether the statement was a fact

or an opinion, or whether it was true or false." *Id.* at 880.[9]

According to the lower courts, however, the wellspring of authority for the constitutional rule that only false statements of fact can be the subject of defamation liability is *Gertz*.[10] In that case, the Court recognized

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[9] These decisions, as the Court acknowledged in *Hepps*, "do not break new ground . . . in insulating speech that is not even demonstrably false." 475 U.S. at 778 (citing Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984)). In *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984), the Court had also expressed its "concern," albeit in dicta, "that the statements at issue tread the line between fact and opinion." Similarly, in *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. at 13-14, the Court held that "rhetorical hyperbole, a vigorous epithet" not understood by "even the most careless reader" as an assertion of fact, could not constitute actionable defamation "as a matter of constitutional law." And, in *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284 (1974), the Court applied these constitutional principles by analogy in the context of the federal labor laws, and held that "there must be a false statement of fact" before there can be actionable defamation.

[10] In all, at least 200 lower court decisions rely upon *Gertz* for this proposition. *See, e.g., Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir.), *cert. denied*, 474 U.S. 843 (1985); *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983); *Ollman v. Evans*, 750 F.2d at 974; *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1358 (Colo. 1983); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 950 (1977); *Restatement (Second) of Torts* § 566 comment c, at 172 (1977); Note, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1008-09 (1986) ("Nearly every jurisdiction in the United States cites the *Gertz* dictum as binding constitutional authority."). Although members of this Court have, on occasion, chastised the lower courts for concluding that *Gertz* identifies a facile distinction between "opinion" and "fact," *see Ollman v. Evans*, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., with Burger, C.J., dissenting from denial of certiorari); *Miskovsky v. Oklahoma Publishing Co.*, 459 U.S. 923, 925 (1982) (Rehnquist, J., with White, J., dissenting from denial of certiorari), the Court has consistently recognized, as the cases discussed herein demonstrate, that only false statements of

that "there is no constitutional value in false statements of fact," but conceded that "[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340. Thus, *Gertz* presaged the express holding in *Hepps* that the plaintiff in a defamation action involving expression of public concern must prove that the defendant published a false statement of fact. *See* 475 U.S. at 768-69.[11]

B. The Lower Courts Are Hopelessly Divided In Their Efforts To Identify Nonactionable Expression

Although there is virtual unanimity in the lower courts concerning the nonactionability of speech that does not contain a false assertion of fact, fundamental differences have arisen among these same courts when articulating their methods of identifying such protected expression. This wide divergence of views is particularly troubling because the courts regularly purport to invoke "a privilege that derives from the Constitution, not from state law." *Lewis v. Time, Inc.*, 710 F.2d at

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fact may constitutionally be the subject of civil sanctions in a defamation action. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

[11] *Accord Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988) ("[t]he absolute protection accorded statements of opinion stems, in part, from plaintiff's burden of proving falsity"); *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983) ("An opinion is protected because it cannot, under *Gertz*, be 'false.'"). The lower courts' emphasis on dicta in *Gertz* that "[u]nder the First Amendment there is no such thing as a false idea," 418 U.S. at 339, has occasionally obscured the point that "[b]ecause of the nature of [some allegedly defamatory] statement[s], the plaintiff never can satisfy his burden of proof on the issue of the statement[s'] falsity." Franklin & Bussel, *supra* note 9, at 874. Indeed, it has been suggested that "[p]erhaps the most important consequence of requiring the plaintiff to prove the falsity of the statement is that the courts now can discard permanently the spurious distinction between fact and opinion." *Id.* at 869.

555; *accord Potomac Valve & Fitting Co. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285 n.13 (4th Cir. 1987).

Perhaps the largest following in the lower courts has developed around Section 566 of the *Restatement (Second) of Torts*, the formula invoked by the Rhode Island Supreme Court in the instant case.[12] According to the *Restatement*:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Restatement (Second) of Torts § 566 (1977). Thus, the *Restatement* purports to recognize "two kinds of expression of opinion," the "pure type" and the "mixed type." *Id.* comment b. The former "occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff;" the latter "is one which, while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated." *Id.* This distinction, in the view of the *Restatement* and its judicial adherents, is mandated by the First Amendment. *Id.*; *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290, 501 N.E.2d 550, 553, 508 N.Y.S.2d 901, 904 (1986).

An increasing number of courts, however, have rejected the *Restatement* view, opting instead for a multi-factor test designed to distinguish actionable statements of fact from protected expressions of opinion, belief, hyperbole

[12] *Accord Avins v. White*, 627 F.2d 637, 642 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); *Prisker v. Brudnoy*, 389 Mass. 776, 776, 452 N.E.2d 227, 228 (1983); *Nevada Indep. Broadcasting Corp. v. Allen*, 99 Nev. 404, 411, 664 P.2d 337, 342 (1983); *Kotlikoff v. Community News*, 89 N.J. 62, 68-69, 444 A.2d 1086, 1089 (1982); *Bucher v. Roberts*, 198 Colo. 1, 4, 595 P.2d 239, 241 (1979); Note, *supra* note 10, at 1012 (*Restatement* test "is the predominant view in the lower courts").

and other nonverifiable assertions.[13] Perhaps the most influential of the multi-factor tests is the one articulated by the District of Columbia Circuit in *Ollman v. Evans*, 750 F.2d at 978-79. Discarding the *Restatement* approach on the ground that "it is quite impossible to lay down a bright-line or mechanical distinction," the court in *Ollman* sought to "state plainly the factors that guide us in distinguishing fact from opinion." *Id.* at 978. Accordingly, *Ollman* identifies four factors for use in "assessing whether the average reader would view the statement as fact." *Id.* at 979.

First, the *Ollman* test examines "the common usage or meaning of the specific language of the challenged statement itself" to determine whether it "has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous." *Id.*; *see Buckley v. Littell*, 539 F.2d 882, 893-94 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). Second, the *Ollman* test considers "the statement's verifiability—is the statement capable of being objectively characterized as true or false?" 750 F.2d at 979; *see Hotchner v. Castillo-Puche*, 551 F.2d at 913. Third, the *Ollman* test addresses "the full context of the statement," because "other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer" factual content. 750 F.2d at 979; *see Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. at 13-14. Finally, courts applying the *Ollman* test evaluate "the broader context or setting in which the statement ap-

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[13] *See, e.g., Ollman v. Evans*, 750 F.2d at 978-79; *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1016-17 (1st Cir. 1988); *Potomac Valve & Fitting Co. v. Crawford Fitting Co.*, 829 F.2d at 1284-85; *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 224 (2d Cir. 1985); *Janklow v. Newsweek, Inc.*, 788 F.2d at 1302; *cf. Information Control Group v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980); *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 715-17 (11th Cir. 1985).

pears," to ascertain whether it "signal[s] to the reader the likelihood of a statement's being either fact or opinion." 750 F.2d at 979; *see Old Dominion Branch No. 496 v. Austin*, 418 U.S. at 284.

Another group of lower courts has found it unnecessary to choose between the *Restatement* and *Ollman* approaches, and has instead purported to apply both. *See, e.g., Capan v. Daugherty*, 402 N.W.2d 561, 563-64 (Minn. App. 1977). Still other jurisdictions have rejected both alternatives and have opted instead for their own unique formulations. *See, e.g., Dunlap v. Wayne*, 105 Wash. 2d 529, 538, 716 P.2d 842, 848 (1986); *Presidio Enters., Inc. v. Warner Bros. Dist. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986).

With increasing frequency, lower courts have acknowledged their "struggle[] to formulate a test that is workable in actual practice" in an area in which this Court "has provided little guidance." *Keller v. Miami Herald Publishing Co.*, 778 F.2d at 715 n.11 & 717. Adrift in these "uncharted waters," *Henry v. Halliburton*, 690 S.W.2d 775, 783 (Mo. 1985), at least one federal circuit has expressly announced its reluctance even to address the issue. *See Stevens v. Tillman*, 855 F.2d 394, 398-400 (7th Cir. 1988) (courts have "wrestled with the question" and have "come up with buckets full of factors to consider"), *cert. denied*, 109 S. Ct. 1339 (1989). As the Seventh Circuit has most recently observed, "[t]his is hardly a satisfactory state of affairs." *Id.* at 398.[14]

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[14] *Accord* Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809, 810 (1988) (noting "absence of clear guidance from the Supreme Court" and resulting "struggle[] to formulate tests"). The conflict in the lower courts is nowhere more evident than in Rhode Island, where, as in the instant case, the state courts reject *Ollman* and apply the *Restatement* formulation, *see* App. 26a-27a, while the federal courts have opted for the *Ollman* analysis, *see Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d at 1016.

C. The *Restatement* Formulation Is Constitutionally Unacceptable

Perhaps the least "satisfactory" aspect of the current "state of affairs," as demonstrated by the instant case, is the constitutional mischief inherent in the *Restatement* formulation. Courts and commentators alike have recognized that the *Restatement* test "encourages self-censorship" and exhibits "serious first amendment problems."[15] As the following discussion illustrates, the absence of "undisclosed facts"—the *sine qua non* of the *Restatement* test—cannot be "a condition precedent" to constitutional protection for expression that is not itself false. *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 266 n.7, 721 P.2d 87, 94 n.7, 228 Cal. Rptr. 206, 213 n.7 (1986), *cert. denied*, 479 U.S. 1032 (1987).[16]

Initially, the *Restatement* test provides courts and litigants with precious little guidance concerning how they are to determine when an otherwise nonactionable statement implies undisclosed facts and, if so, how those undisclosed facts are to be identified. In most cases, it will be "impossible to identify a single set of facts upon which the action is based." Franklin & Bussel, *supra* note 9, at 882. In addition, the *Restatement* does not indicate how many facts must be set forth to preserve the constitutional privilege and it nowhere advises courts how to determine if those facts support a defamatory inference. As a result, the *Restatement* invites courts and juries "to engage in guessing-games about

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[15] Note, *supra* note 10, at 1039, 1045; *accord Janklow v. Newsweek, Inc.*, 788 F.2d at 1305 n.8; *Ollman v. Evans*, 750 F.2d at 984-85; Franklin & Bussel, *supra* note 9, at 880; Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621, 1622-30 (1977).

[16] Several commentators have suggested that the constitutional infirmities of the *Restatement* test can be traced to the apparent reluctance of its drafters to recognize First Amendment restrictions on the reach of the common law in the first place. *See* Note, *supra* note 10, at 1014; *accord* Christie, *supra* note 15, at 1630.

possible uncomplimentary inferences that can be drawn from statements of opinion." *Bussie v. Lowenthal*, 535 So. 2d 378, 383 (La. 1988).[17]

The *Restatement* formulation also empowers courts to determine whether journalists and their editors have "correctly" selected for publication, from the array of available facts, those necessary to legitimize the stated opinion. A number of courts have justly criticized this by-product of the "undisclosed fact" inquiry, because it intrudes on "matter[s] of editorial judgment in which the courts, and juries, have no proper function." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d at 383, 366 N.E.2d at 1308, 397 N.Y.S.2d at 952.[18] Similarly, the *Restatement* is silent concerning how its test should be applied when a stated opinion could be based either on facts set forth in the publication at issue, or on other facts that are not disclosed. *See Buckley v. Littell*, 539 F.2d at 890-91; *Bucher v. Roberts*, 198 Colo. at 4, 595 P.2d at 241.

Finally, by focusing solely on whether the facts supporting an opinion have been adequately set forth, the *Restatement* makes dispositive of the constitutional inquiry only one of a number of potentially relevant factors. "In a word, disclosure of facts in the surrounding text is not the *only* signal that hard facts cannot reasonably be inferred from a statement." *Ollman v. Evans*,

[17] Not surprisingly, even courts purporting to apply the *Restatement* test have reached divergent results based on remarkably similar facts. In *Burns v. Denver Post, Inc.*, 43 Colo. App. 325, 606 P.2d 1310 (1979), for example, the court concluded that a newspaper had set out all relevant facts supporting its conclusion that a policeman's wife had left him because of injuries he sustained in the line of duty. In *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1354 (Colo. 1983), however, the court concluded that disclosure of those same facts did not support a television station's statement that the wife had "deserted" her husband.

[18] *Accord Landerbuck v. American Broadcasting Cos.*, 741 F.2d 193, 198 (8th Cir. 1984) ("not all information favorable to the plaintiff need be disclosed"), *cert. denied*, 469 U.S. 1190 (1985).

750 F.2d at 985. Nevertheless, by implicitly "rejecting the other factors that may signal that a statement is to be read as opinion," the *Restatement* manifests a palpable potential "to mislead." *Id.*

The instant case is illustrative. Applying the *Restatement* test, the trial court instructed the jury that:

> If you find that the reporter had available to him facts that he failed to reveal, and the disclosure of these facts would have *ensured* that a reasonable person could not have construed the existing facts in a manner which reflected negatively on Dr. Healey, you may find that the defendant defamed the plaintiff.

R. 626; App. 6a (emphasis added). In this manner, the trial judge placed upon the newspaper the burden of disclosing all facts, whether defamatory or not, that "would have ensured" that its publication did not "reflect[] negatively on Dr. Healey." *Id.* Moreover, the Rhode Island Supreme Court, again applying the *Restatement*, held "that by including the John Lampinski *opinion* in the article, defendant created the implication that plaintiff was asked and refused to help Lampinski and that there was enough time for plaintiff to render aid," App. 10a (emphasis added), even though there is no such statement contained in the article itself. According to the Rhode Island Supreme Court, "[t]he 'defamation' at issue here really consists of what was left unprinted as well as what was actually printed." *Id.*

Thus, on the authority of the *Restatement*, the courts below held that an acknowledged "opinion," App. 10a, itself incapable of being proven false, is rendered actionable because of "what was left unprinted," *id.*, even though *what was printed* directly contradicts the purportedly false implication that Healey "was asked and refused to help" Lampinski, *id.*[19] In the absence of a

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[19] The article itself simply reports that John Lampinski said his family is "angry" because "they feel" their father "should have been given early attention" by a doctor present "at the board

false statement of fact, however, the plaintiff could not constitutionally be deemed to have carried his burden of proof, *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. at 777, and *The Evening Times* should have been awarded judgment as a matter of law.

D. The *Ollman* Test, Which Affords Constitutional Protection To The Expression At Issue, Should Be Adopted By This Court

By rejecting the test adopted in *Ollman*, and opting instead for the formulation set forth in the *Restatement*, the court below subjected constitutionally protected expression to an award of civil damages. Application of the *Ollman* test, by contrast, focuses "the courts' judgment on the correct issue," Franklin & Bussel, *supra* note 9, at 879, *i.e.*, whether the plaintiff can carry its burden of proving falsity, and demonstrates that the expression at issue is nonactionable as a matter of law.

First, the *Ollman* formulation directs courts to "determine whether the allegedly defamatory statement has a precise meaning and thus is likely to give rise to clear factual implications." 750 F.2d at 980. In the instant case, the allegedly defamatory statement reports only that members of the Lampinski family are "angry" because they "feel" their father "should have been given early attention" by a doctor. App. 5a. Such statements are " 'loosely definable' or 'variably interpretable' " and "cannot in most contexts support an action for defama-

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meeting." App. 44a. Moreover, the article discloses that (1) Lampinski collapsed at MacColl Field, "about 200 yards away" from the meeting; (2) Lampinski was "given cardiopulmonary resuscitation at the time by a bystander who said he was a paramedic"; and (3) Healey was "informed that Lampinski had collapsed, an ambulance had been called and that persons at the scene were treating him." App. 44a-45a. In addition, the article expressly quotes a YMCA official as stating that any "accusation that Dr. Healey knew something and didn't do anything" is "false," even though it is undisputed that Healey was informed that Lampinski had collapsed and that Healey chose not to interrupt the meeting, even briefly.

tion." *Ollman v. Evans*, 750 F.2d at 980 (quoting *Buckley v. Littell*, 539 F.2d at 895).

Second, the *Ollman* test probes whether the statement at issue is "objectively capable of proof or disproof." 750 F.2d at 981. As Judge Bork has noted, "[i]t is relatively easy to litigate a false statement of fact: it may be impossible to prove or disprove an opinion." *Id.* at 1005-06 (Bork, J., concurring). Even the Rhode Island Supreme Court concedes that, on its face, the only statement at issue here is an "opinion," App. 10a, which merely expresses the subjective emotions and beliefs of the Lampinski family.

Any objective or "factual" content that may be divined from John Lampinski's "opinion," therefore, must come from an analysis of the context in which it was published—the third and fourth components of the *Ollman* test. Especially when the language surrounding the statement "is cautiously phrased in terms of apparency," it is unlikely to be construed as a statement of fact. *Information Control Group v. Genesis One Computer Corp.*, 611 F.2d at 784 (citation omitted). Similarly, as the *Restatement* test itself recognizes, the disclosure of other facts surrounding the allegedly defamatory statement may suggest or negate the existence of an assertion of fact. *See Rinsley v. Brandt*, 700 F.2d at 1309. In the instant case, the statements at issue are preceded by a reference to what the Lampinski family, which is concededly "angry," "feel . . . should have been" done under the circumstances. App. 44a. In addition, the article not only expressly labels "the accusation that Dr. Healey knew something and didn't do anything" as "false," App. 45a, it sets forth a litany of facts that directly contradict the allegedly "false" implication embraced by the court below—*i.e.*, that Healey was "asked and refused to help Lampinski." *See* note 19 *supra*.

Finally, the fourth component of the *Ollman* test looks to the social context or setting in which the expression

at issue was published. *See Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987). The statements at issue here were uttered in the midst of a heated public controversy, one in which the participants were "angry" and emotional. In this atmosphere of confrontation, the First Amendment recognizes the tendency for the war of words to become "heated, as debates about controversial issues usually are," and to include, as ammunition, statements not realistically subject to proof of their truth or falsity. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. at 13.

As the foregoing discussion demonstrates, the *Ollman* test effectively identifies expression, such as the speech at issue here, which is not susceptible of meaningful proof of falsity. Unlike the *Restatement* formulation, which makes dispositive a single factor—the quixotic search for "undisclosed facts"—the *Ollman* test serves the overriding constitutional interest in limiting defamation liability to the publicaton of "false statement[s] of fact." *Hustler Magazine v. Falwell*, 108 S. Ct. at 882.

II. The Decision Below Has Compromised The "Actual Malice" Standard In Its Application To Defamation By Implication

This Court has repeatedly held that a finding of "actual malice" must be supported by "sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of [its] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added). Moreover, proof of "actual malice" must be established by "clear and convincing" evidence. *Bose Corp. v. Consumers Union*, 466 U.S. at 511.

Although the Rhode Island Supreme Court identified no false statement of fact in the article at issue, it nevertheless concluded that the article was rendered false and defamatory by "implication." App. 10a; *see* p. 20 *supra*. Moreover, the court held that the jury's

award of punitive damages was supported by sufficient evidence of "actual malice"[20] because the record could support a jury "finding that defendant knew these implications were false or that it acted in reckless disregard of whether these implications were true or false by failing to disclose the firsthand information that would have dispelled the defamatory implications in the article as it was published." App. 10a.[21]

The Rhode Island court never considered whether *The Evening Times* was even aware of, let alone intended, the false and defamatory implication attributed to its publication. Instead, the court concluded that certain false and defamatory facts that "could be" inferred from the article at issue, coupled with *The Evening Times*' alleged failure to report every fact known to it that might negate those inferences, required affirmance of the jury's finding of "actual malice." *Id.*

By this approach, the court below has effectively repealed the constitutional protection previously afforded publications not made "with [a] high degree of awareness of their probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), in cases in which defamatory facts are nowhere stated, but rather must be implied to render the publication false. Such a rule "dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *New York Times Co. v. Sullivan*, 376 U.S. at 279.

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[20] In *Gertz*, this Court held that, at least in cases involving matters of public concern, the plaintiff, even if a so-called "private figure," must demonstrate "actual malice" to recover punitive damages. 418 U.S. at 349.

[21] By applying this restrictive standard of appellate review, the court below neglected its obligation to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose Corp. v. Consumers Union*, 466 U.S. at 511.

A. The Decision Below Reflects A Demonstrable Conflict In The Lower Courts

The Rhode Island Supreme Court's analysis is no aberration. In the absence of guidance from this Court, the lower courts have, with markedly inconsistent results, endeavored to apply the "actual malice" standard to cases involving defamatory implications.[22] Too often, courts have misapplied the standard and have found "actual malice" from the mere imputation of a possible defamatory implication to the publication at issue, regardless of whether the defendant was aware of the implication or of its falsity. For example, in *Hunt v. Liberty Lobby, Inc.*, 720 F.2d 631, 646 (11th Cir. 1983), the defendant's publication contained headlines that "could have conveyed" the erroneous impression that the plaintiff was involved in the assassination of President Kennedy. Although the defendant insisted at trial "that the headlines were only meant to reveal a plan to falsely accuse or frame" the plaintiff, the court held that the jury could properly have found that the headlines were published with "actual malice" because the defendant "knowingly chose language that was subject to a false and highly defamatory interpretation." *Id.*[23]

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[22] As cases involving allegations of defamation by implication have become increasingly prevalent, the lower courts have addressed the issue under a variety of different aspects of the law of defamation, including defamatory meaning, *see, e.g., Cianci v. New Times Publishing Co.*, 639 F.2d 54, 60 (2d Cir. 1980); *Forsher v. Bugliosi*, 26 Cal. 3d 792, 803, 608 P.2d 716, 721, 163 Cal. Rptr. 628, 634 (1980); substantial truth, *see, e.g., Schaefer v. Lynch*, 406 So. 2d 185, 188 (La. 1981); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978); and nonactionable "opinion," *see, e.g., Janklow v. Newsweek, Inc.*, 788 F.2d at 1305.

[23] Other courts have employed a similar analysis. *See, e.g., Buckley v. Littell*, 539 F.2d at 896 (in imposing liability under "actual malice" standard, the jury was free to reject defendant's testimony that he did not intend to accuse the plaintiff of libel where "the clear meaning to be inferred" from defendant's publication "was that he considered Buckley to be a libeler"); *Montandon*

Such holdings, however, are squarely at odds with a host of other decisions that have also purported to apply the "actual malice" standard to defamations by implication. These courts have held that, where defamatory facts are not stated by the defendant but instead may be implied from its publication, "actual malice" cannot be established without clear and convincing proof, not only that the defendant knew its publication was probably false, *see Garrison v. Louisiana*, 379 U.S. at 74, but also that the defendant "either intended the [publication] to contain such a defamatory implication or . . . knew that readers could reasonably interpret the statement to contain the defamatory implication," *Woods v. Evansville Press Co.*, 791 F.2d 480, 487 (7th Cir. 1986).

In *Woods v. Evansville Press Co.*, for example, the plaintiff claimed that a newspaper column "falsely implies that he is dishonest, is in financial trouble, and is a religious fraud," and cited the admission of the column's author that he believed the plaintiff "to be honest, very wealthy, and deeply religious" as proof of "actual malice." 791 F.2d at 486. Although the Seventh Circuit assumed that the "column can reasonably be read to contain the defamatory implications that the plaintiff ascribes to it," the court added that "there is no evidence that the defendants . . . shared the plaintiff's interpretation . . . or intended that the column be read to contain the defamatory innuendos the plaintiff attributes to it." *Id.* at 486-87. Accordingly, the court found insufficient evidence "to create a triable issue that the

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v. Triangle Publications, Inc., 45 Cal. App. 3d 938, 949, 120 Cal. Rptr. 186, 193 (despite uncontradicted evidence that defendant neither intended nor was aware that its publication gave rise to defamatory implication, court concluded that "actual malice" standard had been satisfied because the implication was "one which those responsible [for the publication] should have foreseen and one which showed a reckless disregard for the truth or falsity of the statement"), *cert. denied*, 423 U.S. 893 (1975).

defendants acted with actual knowledge or with reckless disregard of the falsity of the column." *Id.* at 487.[21]

As the following discussion demonstrates, the decision below perpetuates this sharp conflict in the lower courts concerning the application of the "actual malice" standard in the defamatory implications context. Indeed, because the rule applied by the Rhode Island Supreme Court is inconsistent with the constitutional underpinnings of the "actual malice" standard, certiorari should be granted to resolve this important issue of constitutional law.

B. The Decision Below Undermines The Constitutional Requirement That An Award Of Punitive Damages Be Supported By Proof Of "Actual Malice"

In *New York Times Co. v. Sullivan*, this Court recognized that a rule requiring newspapers "to guarantee the truth of all [its] factual assertions—and to do so on pain of libel judgments virtually unlimited in amount" —would inevitably lead to "self-censorship." 376 U.S. at 279. Accordingly, even speech that is false and defamatory is entitled to constitutional protection under the "actual malice" standard unless it is uttered with

[21] Various courts have reached the same conclusion. *See, e.g., Sacuz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1318 (7th Cir. 1988) ("Not only must the plaintiff establish that the statement is susceptible of a defamatory meaning which the defendants knew to be false or which the defendants published with reckless disregard for its potential falsity, but also that the defendants intended to imply or were reckless toward the implications."); *Dratzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830, 831 (8th Cir. 1974) ("[N]either [the reporter] nor any other employee of McGraw-Hill entertained any suspicion that plaintiff would be libeled by the article or that the use of the . . . poster might convey a false impression of the trucking company's financial condition. Thus we conclude that there was no showing of a 'reckless disregard' for the truth."); *Fong v. Mercau*, 63 Haw. 72, 73, 657 P.2d 875, 876 (1982) ("actual malice" not established where defendant testified that he did not intend to create false implication attributed to his statement by plaintiff).

at least a "high degree of awareness of [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74.

Yet, the Rhode Island Supreme Court has permitted a finding of "actual malice" to be based upon the mere possibility that a false and defamatory implication could be imputed to the publication at issue, even though there is no evidence that *The Evening Times* either knew or intended that the article would be read to contain the defamatory implication now attributed to it.[25] The lower court's approach affords no recognition to the constitutional requirement of "awareness of . . . probable falsity" imposed by the "actual malice" standard. *Id.* Under the Rhode Island court's view, even the defendant's undisputed, good faith failure to recognize a defamatory implication will not prevent a finding of "actual malice," if such an implication could reasonably have been inferred by a reader and the defendant could have acted to dispel it.

By imposing on a publisher an absolute obligation "to guarantee the truth of all the inferences a reader might reasonably draw from [its] publication," the judgment below "undermine[s] the uninhibited, open discussion of matters of public concern" that the "actual malice" rule seeks to preserve. *Woods v. Evansville Press Co.*, 791 F.2d at 487. Under this approach, "[a] publisher reporting on matters of general or public concern" is "charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling

[25] The court below does not explain why *The Evening Times*' failure to report expressly that Gaulin was "at the scene" of Lampinski's collapse, that he helped give Lampinski cardiopulmonary resuscitation, and that he "knew that an ambulance arrived at the scene within five to ten minutes of Lampinski's collapse" would negate an inference that Healey "was asked and refused to help Lampinski," much less support a finding "that defendant knew" that these defamatory implications "were false or that it acted in reckless disregard of whether these implications were true or false." App. 10a.

out all possible false and defamatory innuendos that could be drawn." *Id.* at 487-88.[26] "[T]he pall of fear and timidity" imposed by such a rule "upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *New York Times Co. v. Sullivan*, 376 U.S. at 278.[27] Accordingly, this Court should grant certiorari in this case and declare that "actual malice" cannot be established without clear and convincing proof that the publisher harbored a "high degree of awareness" of both the allegedly defamatory import of its words and of the "probable falsity" of that implication. *Garrison v. Louisiana*, 379 U.S. at 74.

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[26] Even if, as Healey contended, the article at issue could reasonably be read to imply that he refused a request and had an opportunity to assist Lampinski, "[t]his is not to say . . . that the plaintiff's interpretation of the [article] is the only reasonable one or that the [article's] author . . . shared this reading. Different, innocent constructions also reasonably could have been drawn" from the article. *Woods v. Evansville Press Co.*, 791 F.2d at 486. Indeed, the most obvious interpretation of the criticism leveled against Healey is the concededly accurate observation that he failed to come to Lampinski's assistance or even to interrupt the meeting temporarily after he learned of Lampinski's collapse. As Judge Lagueux correctly noted, "many reasonable and right thinking people" would find this undisputed behavior insensitive and objectionable. App. 17a.

[27] Ironically, while the "actual malice" standard protects a defendant who utters a statement that he knows will injure another's reputation, so long as the statement is not made with "a high degree of awareness of [its] probable falsity," *Garrison v. Louisiana*, 379 U.S. at 74, the Rhode Island court's approach affords no constitutional protection at all to a publisher who is not even aware that his statement may be interpreted to damage another's reputation. Such an anomaly quite correctly has been described in the literature as "perverse." Franklin & Bussel, *supra* note 9, at 840; *see id.* at 834 ("[r]equiring the plaintiff to prove that the publisher . . . was aware of, or recklessly blinded himself to, the defamatory import of his words logically stems from . . . *New York Times*").

CONCLUSION

In this case, a $278,600 penalty, including $250,000 in punitive damages, has been assessed against a community newspaper for doing that which is both routine and essential in a democracy: accurately reporting both sides of a public dispute surrounding an important local institution and its leaders. *See Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. at 13. The decision below typifies a disturbing and widespread conflict among the lower courts with respect to the proper application of First Amendment safeguards to expression that is not false, but which may be read to imply false and defamatory facts. This confusion cannot be dispelled without a clear declaration from this Court that only false statements of fact are actionable in defamation and that expression does not automatically lose its constitutional protection because one of its possible interpretations may be false and defamatory. The contrary rule, adopted by the Rhode Island Supreme Court here, "would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." *Id.* at 13-14. Accordingly, *The Evening Times* respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted.

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APPENDIX

APPENDIX

RHODE ISLAND SUPREME COURT

No. 87-489-Appeal

PAUL J. M. HEALEY, M.D.

v.

NEW ENGLAND NEWSPAPERS, INC.
d/b/a THE PAWTUCKET EVENING TIMES

OPINION

March 3, 1989

SHEA, J. This matter is before the Supreme Court on the defendant's appeal from a judgment for the plaintiff after a jury trial in the Superior Court. We affirm.

This case was originally tried before a jury in Providence County Superior Court in 1984. At the close of the evidence the trial justice granted defendant's motion for directed verdict. This court sustained plaintiff's appeal, vacated the judgment, and remanded the case to the Superior Court for a new trial. *Healey v. New England Newspapers, Inc.*, 520 A.2d 147 (R.I. 1987) (Healey I). At the conclusion of that trial, which resulted in a jury verdict for plaintiff, the trial justice denied defendant's motion for a new trial and also denied defendant's motion for a directed verdict on which decision had been reserved.

The facts of this case are fully stated in *Healey I*, but must be related again for easier understanding of the issues. The law suit arose out of several articles published by defendant, the Pawtucket Evening Times (the Times), in June 1980. The events that gave rise to the allegedly libelous articles concerned a controversy that had developed between Pawtucket-Central Falls YMCA (YMCA) employees and board members regarding a personnel-committee decision to terminate two employees. The plaintiff, Paul J. M. Healey, M.D., a Pawtucket, Rhode Island, physician, was president of the YMCA's board of directors at the time. He had no direct involvement with the terminations. On June 23, 1980, the YMCA board of directors held its monthly meeting. Because there was concern about a possible disturbance from protestors opposed to the two terminations, a security officer was hired to stand just outside the YMCA physical fitness center, where the meeting took place. People were in fact picketing at MacColl Field, a YMCA property about 400 yards from the physical fitness center.

After a roll call was taken, Dr. Healey, who conducted the meeting, directed Gerald Lampinski to leave. Lampinski was a YMCA member who claimed to be attending the meeting as a proxy for a board member who was unable to attend. The plaintiff ruled that no arrangements for a proxy had been made and that the meeting was restricted to the board of directors. After voicing his objection Lampinski left the room.

The plaintiff testified that thirty minutes after the meeting began, Frank Smith, executive director at the YMCA Westwood branch, told plaintiff and Robert Bendl, who were seated next to each other, that Lampinski had collapsed at the front of MacColl Field. Bendl was general executive director of the YMCA at the time. The plaintiff testified that he asked if he could be of any help. Smith told him that two people were administering cardiopulmonary resuscitation (CPR) and that an ambulance

was either there or on the way. The plaintiff also testified that he called the hospital that evening and learned that Lampinski had died.

Esselton McNulty, executive director of the family branch of the YMCA, testified that he saw the security officer enter the board meeting and attempt to beckon to Jack Griffin, a board member and paramedic. He said that he saw Griffin shake his head no to the officer (which Griffin later denied) so McNulty went to the officer and was informed that Lampinski had collapsed. McNulty sent Ron Mayer, executive director of the MacColl Field YMCA, to assist Lampinski. McNulty testified that he then left the building and spoke with Roy Bergeron, a YMCA member, who told him that Lampinski had collapsed, that a medic was attending him, and that an ambulance had been called. In response to McNulty's offer Bergeron said that he did not want any help, McNulty added. McNulty then returned to the board meeting where he told Smith to advise Bendl that Lampinski had collapsed, that an ambulance was on the way, and that everything was being taken care of.

Smith testified that McNulty did ask him to tell Bendl that Lampinski had collapsed, he was being attended to, an ambulance had been called, and everything was under control.

Edward Gaulin, a reporter for the Times, was at MacColl Field when Lampinski collapsed. At first Gaulin assisted another person in administering CPR to Lampinski, but he was soon relieved by someone who said he was a paramedic. Approximately five to ten minutes after Lampinski had collapsed, an ambulance arrived on the scene. Later that evening Gaulin spoke with Bergeron, who said that he was upset because, according to Griffin, the board was not informed for thirty minutes after plaintiff and Bendl had been informed that Lampinski had collapsed. Bergeron also criticized plaintiff, as a doctor, for not assisting Lampinski.

On the morning of June 24, Gaulin spoke with McNulty. McNulty testified that at that time Gaulin asked him if plaintiff had refused to aid Lampinski. McNulty said he told Gaulin that that impression was not correct, that it would be a big mistake to print that plaintiff had refused to aid Lampinski. McNulty then relayed to Gaulin the message he had given to Smith. Gaulin testified that, after unsuccessfully trying to contact plaintiff several times, he reached McNulty. Gaulin remembered McNulty's telling him that the message relayed to plaintiff was that Lampinski had collapsed, he was being treated, an ambulance was called, and the situation was well in hand. Gaulin said that he did not remember the warnings against publishing anything implying that plaintiff refused to aid Lampinski.

On June 24, 1980, the day after Lampinski's collapse, the Times published an article by reporter Gaulin about the incidents at MacColl Field the night before. The fourth edition of the Times included the information that Bergeron, a friend and supporter of Lampinski, was critical of plaintiff, a surgeon, for his failure to respond with aid to Lampinski's collapse.

Lampinski's son, John, testified that on the evening of June 24 he received several phone calls from friends and relatives. They expressed their outrage because of the June 24, fourth-edition article. John Lampinski testified that he was outraged and upset at plaintiff after reading the article. The next day, June 25, after speaking with several people who had witnessed the incident or attended the board meeting and after hearing several different versions of the events surrounding Lampinski's collapse, John Lampinski and one of his brothers went to speak with Gaulin to express their displeasure about plaintiff's apparent lack of response to his father's collapse. During this meeting Gaulin did not reveal to the Lampinski sons that he had been an eyewitness to the collapse, that CPR had been administered to Lampinski within one minute

of his collapse, and that only five to ten minutes had elapsed between the time of Lampinski's collapse and the arrival of the ambulance.

On June 25, 1980, another article, written by Gaulin, entitled "Lampinski sons angry at YMCA board," was published. It related again that Lampinski died of a heart attack during a protest against the YMCA board of directors. The article further related that Lampinski's son, John, said that he was upset with the board for ordering Lampinski to leave the board meeting. The article then stated:

> "John [Lampinski] also said the family is also angry because they feel Lampinski should have been given early attention by either a doctor or a paramedic at the board meeting.
>
> Dr. Paul J. Healey is Y president and was at the meeting when Lampinski collapsed."

John testified that the June 25 article accurately stated his views that he expressed during his meeting with Gaulin.

The first issue defendant raises on appeal is its claim that the trial justice erred in the instruction to the jury regarding plaintiff's burden of proof. We have said that in a defamation action the plaintiff must prove "'(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher'; and (d) damages, unless the statement is actionable irrespective of special harm." *Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339, 1342 (R.I. 1986) (quoting Restatement (Second) *Torts* § 558 (1977)).[1]

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[1] In *Healey v. New England Newspapers, Inc.*, 520 A.2d 147, 149 n.1 (R.I. 1987), we noted the dual definitions of "defamatory." Here, as in *Healey*, the concept of falsity is incorporated into our

With regard to the first element of the standard, we have stated, "[A]ny words, if false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society or bring him into public hatred and contempt, are in their nature defamatory * * *." *Elias v. Youngken*, 493 A.2d 158, 161 (R.I. 1985) (quoting *Reid v. Providence Journal Co.*, 20 R.I. 120, 124-25, 37 A. 637, 638 (1897)). We have also adopted the doctrine that a statement in the form of an opinion may be defamatory and therefore actionable if and only if "it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Belliveau v. Rerick*, 504 A.2d 1360, 1362 (R.I. 1986) (quoting 3 Restatement (Second) *Torts* § 566 at 170). *See also Healey v. New England Newspapers, Inc.*, 520 A.2d 147 (R.I. 1987).

In her instructions to the jury the trial justice explained this doctrine by stating that the jury "should consider whether the reporter, Edward Gaulin, failed to disclose to the reader facts available to him." The trial justice further instructed:

> "If you find that the reporter had available to him facts that he failed to reveal, and the disclosure of these facts would have ensured that a reasonable person could not have construed the existing facts in a manner which reflected negatively on Dr. Healey, you may find that the defendant defamed the plaintiff."

The trial justice also instructed the jury that truth is a complete defense in an action for libel no matter how much harm is done by the statements. She emphasized that "[t]he plaintiff has the burden of establishing that the publications complained of are false. * * * So long

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definition of a defamatory statement. *See Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339, 1342-43 n.4 (R.I. 1986).

as the gist or the sting of the publication is true, the publication is not false." Finally the trial judge explained that plaintiff must "prove that which he asserts or claims by a fair preponderance of the evidence." After a careful review of the instructions given to the jury regarding the law of defamation and the burden of proof, we find no error with the instructions.

Next defendant cites *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and *Major v. Drapeau*, 507 A.2d 938 (R.I. 1986), to support its argument that plaintiff is a "limited purpose public figure" for the purposes of this action. In *Major v. Drapeau*, this court adopted the standard set forth in *Gertz*, where the Supreme Court held that there are two bases for designating an individual a public figure for purposes of defamation actions:

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." 418 U.S. at 351, 94 S. Ct. at 3013, 41 L. Ed. 2d at 812.

The Court then further defined the "limited purpose public figure" designation:

> "We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. * * * It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352, 94 S. Ct. at 3013, 41 L. Ed. 2d at 812.

Considering the nature and extent of plaintiff's participation in the events surrounding Lampinski's collapse, we agree with the trial justice that plaintiff is a private figure for the purposes of this defamation action. The plaintiff was the president of the board of directors of the YMCA when the article in question was published. Further, the controversy over the YMCA personnel decision to terminate two long-term employees attracted publicity during the summer of 1980. However, the controversy giving rise to the defamation did not involve plaintiff's role as president of the board of directors or the public controversy over the terminations. The defamatory statements involved plaintiff's role as a physician and his implied inaction in response to the collapse of a person in need. The article's reference to plaintiff's profession is a reference to his private life, not his public life. Although Lampinski's collapse and subsequent death may have been of public interest, in light of both plaintiff's role as president of the board of directors and Lampinski's role in the controversy over the YMCA employee terminations, the "newsworthy" nature of the incident does not make plaintiff a public figure. *See Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167, 99 S. Ct. 2701, 2707, 61 L. Ed. 2d 450, 460 (1979) ("[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention").

The defendant also argues that the trial justice should not have waited until the conclusion of defendant's case to determine whether plaintiff was a public or a private figure. In *Healey I*, 520 A.2d at 153 n.2, we stated in a footnote, "[T]he trial court must determine, prior to sending this case to the jury, the status of plaintiff as a public or a private figure * * *." The trial justice has complied with this directive. We find no error.

The defendant next challenges the admission into evidence of statements made by third parties not present

at trial concerning the articles in question. In *Gordon v. St. Joseph's Hospital*, 496 A.2d 132 (R.I. 1985), also a defamation case, the trial justice allowed witnesses to testify about what other people had said about the plaintiffs, people who had read the allegedly defamatory statement but who were not present at trial. This court held that "testimony of plaintiffs and their witnesses about what other people were saying concerning their understanding of the libelous statement is admissible to establish the extent to which the statement was read in the community and the effect that it produced." *Id.* at 136 (citing *Chagnon v. Union-Leader Corp.*, 103 N.H. 426, 436, 174 A.2d 825, 832 (1961)). Here these statements are not offered to prove the truth of the matter asserted but are relevant to establish the effect of the publication on those who received it. This exception, as set forth in *Gordon*, is now reflected in Rule 803 (3) of the Rhode Island Rules of Evidence. The trial justice properly overruled defendant's hearsay objections.

In reviewing the denial of defendant's motion for a directed verdict, this court must exercise the same function as that of the trial justice. We must view the evidence in the light most favorable to the nonmoving party, without weighing the evidence or assessing the witnesses' credibility, and draw from the evidence only those inferences that support the nonmoving party's claim. If reasonable minds could differ regarding issues of fact, the motion must be denied, leaving the decision for the jury. *Healey*, 520 A.2d at 149; *Major v. Drapeau*, 507 A.2d at 940; *Haxton's of Riverside, Inc. v. Windmill Realty, Inc.*, 488 A.2d 723, 725 (R.I. 1985).

The defendant argues that plaintiff did not establish that the allegedly defamatory statements were false and malicious and that the defendant was negligent in the republication of the statements. In *Healey I*, 520 A.2d at 152, we found that readers of the John Lampinski statement in the June 25 article could reasonably have

found that it implies several undisclosed defamatory facts. The language could be understood to imply that Lampinski collapsed at the board meeting, that plaintiff was requested to assist Lampinski and that plaintiff refused this request, and that there was ample time for plaintiff to render aid. We also stated that when determining the meaning of an allegedly defamatory communication, one must examine all parts of the communication that are heard or read with it. *Id.* (citing 3 Restatement (Second) *Torts* § 563, comment d at 163-64).

In the article in question Gaulin does explain that Lampinski collapsed 200 yards from the board meeting, that Lampinski received CPR, and that several people at the board meeting disputed the negative implications created by the John Lampinski statement. However, Gaulin was at the scene when Lampinski collapsed. He knew Lampinski was immediately given CPR. In fact, Gaulin first assisted in the CPR and then was relieved by a person claiming to be a paramedic. Gaulin also knew that an ambulance arrived at the scene within five to ten minutes of Lampinski's collapse.

Looking at the evidence in the light most favorable to plaintiff, one could reasonably conclude that by including the John Lampinski opinion in the article, defendant created the implication that plaintiff was asked and refused to help Lampinski and that there was enough time for plaintiff to render aid to Lampinski. The evidence could support a finding that defendant knew these implications were false or that it acted in reckless disregard of whether these implications were true or false by failing to disclose the firsthand information that would have dispelled the defamatory implications in the article as it was published. The "defamation" at issue here really consists of what was left unprinted as well as what was actually printed. We conclude, therefore,

that the trial justice correctly denied the motion for a directed verdict.

The defendant argues that plaintiff failed to meet his burden of proving actual damages. This court has held that an award of compensatory damages may be based upon the mental anguish and humiliation experienced as a result of a defamatory statement. *Bosler v. Sugarman*, 440 A.2d 129, 132 (R.I. 1982). That standard applies to this case. Drawing all inferences in favor of plaintiff, we conclude that there is ample evidence that plaintiff suffered mental anguish and humiliation as a result of the impressions relayed to plaintiff by family, friends, and professional associates after they read the article in question.

The defendant argues that plaintiff failed to establish his entitlement to punitive damages. Because plaintiff has been determined to be a "private figure," he has the burden of proving by clear and convincing evidence that defendant acted with actual malice in publishing a story that contained the implication of undisclosed defamatory facts. Actual malice is either knowledge that a statement is false or reckless disregard for the truth or falsity of the statement. *Major v. Drapeau*, 507 A.2d at 940-41 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755, 105 S. Ct. 2939, 2943, 86 L. Ed. 2d 593, 600 (1985), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964)). As we have stated, the record reveals that information was available to Gaulin prior to publishing the June 25 article that he could have included in the article to clarify any confusion about what plaintiff was asked or told and how he responded; that Gaulin witnessed Lampinski's collapse and remained on the scene and therefore had personal knowledge that plaintiff's conduct was not reprehensible in any way; and that John Lampinski was not at the scene when his father collapsed. The publication of John Lampinski's statement gave rise to an

inference that plaintiff refused to help a person in need of medical attention. The evidence could support a finding by the jury that defendant either knew this implication was false or recklessly disregarded determining whether it was true or false.

Next defendant complains that the trial justice did not instruct the jury that defendant's conduct must amount to "criminality" in order for plaintiff to recover punitive damages. We would point out that this court has adopted the "actual malice" standard set forth by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), for an award of punitive damages in a defamation action. In *DeCarvalho v. daSilva*, 414 A.2d 806, 812-13 (R.I. 1980), we stated that

> "it appears that the present state of the law, as enunciated by the Supreme Court of the United States, imposes upon states two major bodies of restrictions in respect to allowing recovery for defamatory publications. * * * In the event that exemplary damages are to be awarded, then the 'actual malice' element must be shown by clear and convincing evidence."

As we have said, actual malice is actual knowledge of the the falsehood or reckless disregard for the truth or falsity of the allegedly defamatory material. Similarly, in *Gordon v. St. Joseph's Hospital*, 496 A.2d at 137, we stated that in a defamation action, the evidence must support a finding that "defendant published the statement with such wilfulness, recklessness, or wickedness as to support [a punitive damages] award."[2] The evidence in this record

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[2] In *Gordon v. St. Joseph's Hospital*, 496 A.2d 132, 137 (R.I. 1985), we quoted language from *Hagan v. Providence and Worcestor R. R. Co.*, 3 R.I. 88, 91 (1854), which was not a libel case, that in order to warrant a punitive damages award there must be "evidence of such wilfulness, recklessness or wickedness, on the part of the party at fault, as amount[s] to criminality, which for the good of society and warning to the individual, ought to be

would certainly warrant a jury's concluding that plaintiff had established actual malice by clear and convincing evidence.

We also reject the argument that the verdict was so inconsistent as to indicate that the jury did not understand the trial justice's instruction or the application of the law to the facts. The plaintiff had alleged that each of the articles printed on the twenty-fourth and twenty-fifth of June were defamatory. The jury found only the last, the June 25 article, to be defamatory. The plaintiff argues that there are underlying factual distinctions between the two articles that would warrant this jury determination. We agree.

The June 25 article contains a republication of John Lampinski's opinions regarding his father's treatment at the board meeting and upon his collapse. The June 24 article does not. Further, the June 25 article was printed after the reporter had an opportunity to speak with several people who said that the plaintiff had not been asked to assist Lampinski and had been told that everything was in hand. The June 24 article was printed prior to the reporter's receiving this information. Finally, John Lampinski received all his information about his father's collapse from other people who were either at MacColl Field or in the board meeting. John Lampinski's opinion, republished in the June 25 article, implies that Dr. Healey could have, but refused to, aid Gerald Lampinski. Gaulin was a witness to the collapse. He immediately rendered aid to Lampinski and knew that an ambulance arrived within five to ten minutes of Lampinski's collapse. Gaulin

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punished." When we applied this standard to the defamation action at issue in *Gordon*, we did not apply the criminality standard. This elimination is consistent with our case law on defamation and the *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) directive to apply the "actual malice" standard to claims by private individuals alleging defamation and claiming punitive damages.

did not tell John Lampinski that he witnessed the entire event. We believe a jury could find that the publication of John Lampinski's opinion in the second article implied undisclosed defamatory facts known to the defendant to be false or was in reckless disregard for their truth or falsity. The verdict, in our opinion, showed no inconsistency but rather showed that the jury perceived the different legal effect of the articles resulting from the different quantum of information Gaulin possessed as the successive publications and republications occurred.

For these reasons the defendant's appeal is denied and dismissed, the judgment appealed from is affirmed, and the papers of the case are remanded to the Superior Court.

[Order of the State of Rhode Island and Providence Plantations Superior Court granting Defendant's Motion for a Directed Verdict]

[Providence, Sc.
SUPERIOR COURT]

[C.A. No. 80-3101

JUDGE RONALD LAGUEUX]

[PAUL J.M. HEALEY, M.D.

v.

NEW ENGLAND NEWSPAPERS, INC.
d/b/a THE PAWTUCKET EVENING TIMES]

[April 10, 1984]

* * * *

[430] THE COURT: This matter is before the Court on defendant's motion for a directed verdict following the presentation of the plaintiff's case in this libel action. In considering a motion of this type the Court must view the evidence in the light most favorable to the plaintiff and draw all reasonable inferences in favor of the plaintiff. That does not pose a particular problem in this case because most of the operative key and important facts are undisputed. The publications, which are the subject of the plaintiff's complaint, are before the Court and they

speak for themselves. The law on libel is clear whether the plaintiff is a public figure, a public official, or a private individual. In order for a plaintiff to recover for libel the plaintiff must prove that the defendant made a false statement of fact which is defamatory. In other words, the fact which is stated falsely must be defamatory of plaintiff in order to be actionable. That fact must subject the plaintiff to hatred, contempt, or ridicule in the community. It is unnecessary for me in deciding this motion to determine whether the plaintiff, Dr. Healey, is a public figure because I am satisfied that none of the publications in this case contain a false statement of fact which is defamatory. Now I will express my reasons. Plaintiff's #1 is the first edition of The [431] Evening Times which came out reporting the incident of June 23 at the YMCA's MacColl Field and the Board of Directors meeting and the collapse and death of Mr. Lampinski. That publication was not objectionable to the plaintiff. A later edition on the same day produces the same material except for the addition of three paragraphs. Those are the paragraphs about which the plaintiff complains. The paragraphs are: "Raymond Bergeron, a YMCA member and a friend and supporter of Lampinski, today criticized Branch Executive Esselton McNulty and President Paul J. Healey, a surgeon, for failing to react to Lampinski's collapse." Next paragraph: "Bergeron said he drove over to the MacColl building to inform Griffin of Lampinski's collapse, but McNulty came out of the meeting instead." Third paragraph: "Bergeron contended that Healey, as a doctor, should have gone to Lampinski's aid, and that Griffin should have been informed immediately because he was Lampinski's friend. But Bergeron said he found out later the board of directors was not informed of the situation for at least a half hour." In that material there is no false statement of fact. Bergeron was expressing an opinion of Dr. Healey's conduct. Bergeron had a right

to express that opinion and the defendant had a right to report it. It has been clear since 1947 [sic], [432] at least, by virtue of the United States Supreme Court decision in *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323, and even clearer in this State since 1983 when the Rhode Island Supreme Court decided *Hawkins vs. Oden* found at 459 A.2d 481, that the expression of an opinion cannot be the subject of an action in libel. The Rhode Island Supreme Court in *Hawkins* quoted the now famous passage from *Gertz* as follows: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." In this publication Mr. Bergeron was expressing his opinion. The facts are undisputed that Mr. Lampinski collapsed some two hundred yards away from the building where the Y Board was having its meeting and that Mr. Bergeron went down to the meeting to notify Griffin, who was at the meeting, and that notification through McNulty was made to Dr. Healey that Mr. Lampinski had collapsed. The exact content of the communication is not of great moment. We will assume, viewing the evidence in the light most favorable to the plaintiff, that Dr. Healey received a communication from Bergeron to McNulty to Smith to himself and Bendl which was to the effect that Mr. Lampinski had [433] collapsed and he was being attended to, an ambulance had been called, and the situation was under control. It is undisputed that Dr. Healey made a decision to continue the meeting and not adjourn or recess the meeting to go and investigate the facts for himself. That is a decision he made. By virtue of making that decision he opened himself to criticism. There are many reasonable and right thinking people who would think under those circumstances that a doctor would adjourn such a meeting for a short period of time and go see for himself whether his aid was needed. There

are others equally reasonable and right thinking who would think and opine that the doctor had very important matters to deal with at that Y meeting, that the situation seemed to be well in hand, and that there was no need for him to attend to Mr. Lampinski. Therefore, this whole matter was a matter of opinion and a matter which people would discuss and criticize and argue pro and con. Mr. Bergeron had a right to have this opinion and the paper had a right to report it. Furthermore, the paper goes on to state that Mr. Bergeron had this opinion but apparently his opinion had changed because they report that Bergeron said he found out later that the Board of Directors was not informed of the situation for at least half an hour and that indicates clearly [434] to any reasonable mind that Mr. Bergeron now felt that there was no reason to criticize Dr. Healey. Therefore, in this publication there is no false statement of fact which is defamatory of the plaintiff. That's not to say that the press is at times unfair and guilty of poor reporting, but to rise to the level of a libel there must be a false statement of fact which fact falsely stated is defamatory. Now we move to the next article complained of the next day, June 24, that's plaintiff's exhibit 3. The headline was "Lampinski sons angry at YMCA board". That was certainly a true statement of fact. John Lampinski testified that everything he told the defendant when he went down there was fairly reported in this article. The article starts: "The family of Jerry Lampinski, who died of a heart attack Monday during a protest he organized against the Pawtucket YMCA board of directors, today expressed anger at the way their father was treated by the board." The Lampinskis had a right to be angry. They had a right to express that opinion, and the paper had a right to report it. The article goes on that the Lampinski family was upset because their father was not allowed to attend the Board meeting. They had a right to express that. There was nothing false about that. That expresses their opinion.

Then later it says: [435] "John Lampinski said he was told his father was treated rudely when ordered to leave the board meeting, and the agenda of the meeting was taken from him." It is not defamatory to say that a person acted rudely towards another person. The word "rudely" connotes an opinion in any event. Now come the paragraphs where the plaintiff really complains: "John also said the family is also angry because they feel Lampinski should have been given early attention by either a doctor or a paramedic at the board meeting." Next paragraph: "Dr. Paul J. Healey is Y president and was at the meeting when Lampinski collapsed." The plaintiff argues that those two paragraphs mean that the defendant was reporting that Lampinski collapsed at the Board meeting and that the doctor's failure to act was at the Board meeting when Lampinski collapsed. The author of this is guilty of poor English. There is an ambiguity in these two paragraphs, however, that ambiguity is resolved when one reads the next paragraph: "Raymond Bergeron said he was standing near Lampinski when he collapsed and immediately drove from the front parking lot of MacColl Field, where Lampinski collapsed, to the board meeting about 200 yards away to get board member, Jack Griffin, a Providence firefighter and a paramedic." There is no false statement of fact in that material. The Lampinskis [436] had a right to express an opinion that under the circumstances Dr. Healey should have responded. Whether that is a reasonable opinion or not is not for us to be concerned with in a court of law. As the Court in *Gertz* said, opinions of those kinds should be answered, and it's in the marketplace of ideas that these matters are resolved. Dr. Healey could have issued a statement the following morning setting forth all the facts that were at his disposal and justified his decision not to adjourn the meeting and go tend to Mr. Lampinski. Therefore, in both of these articles, which form the basis of the plaintiff's complaint, there are no false statements of

facts which are defamatory. An editorial dated June 27, 1980 has been placed in evidence as plaintiff's exhibit 5 but I've heard no argument from the plaintiff on that subject. Reading the editorial it is obvious that the paper was expressing its opinion about the personnel matter primarily and not about the Lampinski collapse and ultimate death. In any event, the editorial contains only opinion and not a false statement of a fact which is defamatory. Therefore, as a matter of law I conclude that there was no false statement of defamatory material of fact in these articles and, therefore, there can be no recovery by the plaintiff against this defendant, whether or not [437] the plaintiff is considered as a public figure. Under those circumstances the Court grants the defendant's motion for a directed verdict and the clerk will enter judgment for the defendant pursuant to my direction. The objection of the plaintiff to the Court's ruling is noted for the record for preservation of rights.

* * * *

RHODE ISLAND SUPREME COURT

No. 84-351-Appeal

PAUL J. M. HEALEY, M.D.

v.

NEW ENGLAND NEWSPAPERS, INC.
d/b/a THE PAWTUCKET EVENING TIMES

OPINION

February 2, 1987

SHEA, J. This matter is before the court on the plaintiff's appeal from a directed verdict entered for the defendants. The Superior Court law suit for defamation arose out of two newspaper articles published by the defendant the Pawtucket Evening Times (hereinafter the Times) on June 24 and June 25, 1980, regarding the actions of the plaintiff, Dr. Paul J. M. Healey. At the close of the evidence the defendant moved for a directed verdict. The trial justice granted the motion. We reverse.

The alleged libelous publications arose from the following facts. In early June 1980 two employees of the Pawtucket-Central Falls YMCA (YMCA), Beverly Tillier and James Greene, resigned upon request by the YMCA personnel committee. A controversy among other YMCA employees developed over the discharge of Tillier and Greene. The plaintiff was president of the YMCA at this time but played no role in the discharge of these employees.

On June 23, 1980, at approximately 6 p.m., the YMCA board of directors held its monthly meeting in the physical fitness center, a structure in the YMCA complex located approximately 350 to 400 yards from the entrance to MacColl Field in Pawtucket. There was concern that a possible disturbance might take place at MacColl Field owing to the terminations of Tillier and Greene, and as a result security was hired for the meeting.

After a roll call was taken of the directors, Dr. Healey asked all who were not members of the board to excuse themselves and leave the room. At that time Gerald Lampinski, who had been active in the Darlington Plains Outpost (an affiliate of the Pawtucket YMCA), informed Dr. Healey that he was in attendance at the meeting to represent the interests of an absent member, a Mr. Sousa. Doctor Healey told Lampinski that under the rules of the meeting Lampinski would have to leave. Lampinski entered his objections and left the meeting.

Doctor Healey testified that approximately one-half hour after the meeting had begun, Frank Smith, a staff member and executive director of the Westwood Branch of the Pawtucket YMCA, approached Dr. Healey and Robert Bendl, the general executive director of the Pawtucket YMCA, and told them that Lampinski had collapsed outside at the front of the property. Doctor Healey asked Smith if he could be of any help, and according to Dr. Healey, Smith said that Dr. Healey's help was not needed because Lampinski was being attended to by two people using CPR, that a rescue vehicle was either on the scene or immediately expected on the scene, and that Lampinski was in the process of being transported to the hospital. Smith claimed that he had been advised of these events by Esselton McNulty, the executive director of the family branch of the Pawtucket YMCA, who had left the board meeting after the security guard stationed at the complex advised him of Lampinski's collapse. McNulty testified that after leaving the board meeting, he was informed by

Raymond Bergeron, a YMCA member who had been picketing at MacColl Field, that Lampinski had collapsed, that he was being attended by a medic, and that an ambulance had been called. The board meeting continued while the conversation between Smith, Bendl and Healey took place. After the exchange among these three individuals concluded, Dr. Healey continued to preside over the meeting.

At approximately 10 p.m. on June 23, 1980, Dr. Healey contacted the coronary care unit of the hospital to which Lampinski had been transported. Doctor Healey learned that Lampinski had died.

On June 23, 1980, Edward Gaulin, a reporter for the Times, was present at MacColl Field and saw Lampinski collapse at approximately 6:15 p.m. Gaulin and two unidentified males then administered CPR to Lampinski. Approximately five to ten minutes elapsed between the time Lampinski collapsed and the time the emergency vehicle arrived at the scene.

At MacColl Field on the evening in question, Gaulin talked to Bergeron, who complained that no one had come out of the board meeting to assist Lampinski.

On June 24, 1980, defendant published an article by reporter Gaulin about the previous evening's events. The first edition of the paper was published without any reference to criticism of Dr. Healey. However, the fourth edition of the article reported that Bergeron, a friend and supporter of Lampinski, was critical of plaintiff, a surgeon, for his failure to respond to Lampinski's collapse. On June 25, 1980, defendant published another article stating that members of Lampinski's family, after reading the fourth edition of the article of June 24, were angry because they felt Lampinski should have been given early attention by either a doctor or a paramedic at the board meeting.

Lampinski's sons, John and Jeffrey Lampinski, testified that after they had received several calls from friends and relatives outraged over the doctor's apparent lack of response to Lampinski's collapse, they contacted a few other persons who had witnessed the incident. After hearing different versions of the events surrounding their father's death, they went to Gaulin's office in an attempt to learn the truth.

As a result of that conversation, Gaulin wrote another article, published on June 25, 1980, reporting the sons' criticism of plaintiff for his failure to aid their father. Both sons stated that the June 25 article was a fair statement of the views expressed during their meeting with Gaulin.

At the close of evidence defendant moved for a directed verdict, and the trial justice granted the motion, stating that Bergeron and Lampinski's sons had a right to voice their opinions and that defendant had a right to report them. The trial justice declared that a libelous publication must contain a false statement of fact that is defamatory. The trial justice held that neither article contained a false statement of fact. He also declared that opinions reported accurately are not actionable.

This court performs the same function as the trial justice in reviewing a motion for a directed verdict. The evidence is viewed in the light most favorable to the nonmoving party, without weighing the evidence or assessing the credibility of witnesses, and only those inferences that support the nonmoving party's claim are drawn. If issues exist upon which reasonable persons might reach different conclusions, the motion should be denied. *Major v. Drapeau*, 507 A.2d 938, 940 (R.I. 1986).

We begin our analysis by noting that an action in defamation requires proof of "'(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to

negligence on the part of the publisher;' and (d) damages, unless the statement is actionable irrespective of special harm." *Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339, 1342 (R.I. 1986) (quoting 3 Restatement (Second) *Torts* § 558 (1977)). Furthermore, "Rhode Island law incorporates the concept of falsity into its definition of a defamatory statement." [1] 516 A.2d at 1342. As this court has stated:

> "[A]ny words, if false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society or bring him into public hatred and contempt, are in their nature defamatory * * * ." *Elias v. Youngken*, 493 A.2d 158, 161 (R.I. 1985) (quoting *Reid v. Providence Journal Co.*, 20 R.I. 120, 124-25, 37 A. 637, 638 (1897)).

This court has also stated that "[t]he question of whether or not the meaning of a particular communication is defamatory, is one of law for the court." *Gordon v. St. Joseph's Hospital*, 496 A.2d 132, 136 (R.I. 1985) (quoting *Elias v. Youngken*, 493 A.2d 158, 161 (R.I. 1985)). However, whereas the threshold determination of whether a statement is capable of bearing a defamatory meaning is for the court to decide, the ultimate conclusion on whether such a meaning was indeed conveyed is for the jury to decide. *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 60 (2d Cir. 1980); 3 Restatement (Second) *Torts*, § 614.

In an often-quoted dictum from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2997, 3007, 41 L. Ed. 2d 789, 805 (1974), the Supreme Court stated:

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[1] In *Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339, 1342-43 n. 4 (R.I. 1986), this court noted that the word "defamatory" at times is used to include the element of falsity and at times refers only to the particular type of language, that is, injurious to reputation and so forth. In the instant case the concept of falsity is incorporated into our definition of a defamatory statement.

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

Relying in part on *Gertz*, the American Law Institute adopted the view of the 3 Restatement (Second) *Torts* § 566 at 170 that "a statement in the form of an opinion * * * is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." This formulation was quoted with approval in *Belliveau v. Rerick*, 504 A.2d 1360, 1632 (R.I. 1986), and in *Hawkins v. Oden*, 459 A.2d 481, 484 (R.I. 1983). In *Hawkins* this court quoted the language of the Restatement as follows:

> " 'It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct * * *.' " *Id.* at 484.

Comment c to § 566 of the Restatement explains that a plaintiff may recover in a defamation action if the expressed opinion is based on undisclosed or assumed defamatory facts of which the listener is unaware. As stated by the Supreme Court of Colorado, "The opinion must appear reasonably to the listener to be based on defamatory facts which the reporter has not disclosed to the audience but which the audience can reasonably expect to exist." *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1358 (Colo. 1983) (opinions which imply the existence of an undisclosed factual predicate may support a cause of action in defamation); *see also Ollman v. Evans*, 479 F. Supp. 292, 293-94 (D.D.C. 1979) (under *Gertz* and its progeny, no cause of action arises unless defendant's ~~opinions~~ imply underlying false and defamatory statements of facts, implications that are not apparent

here), *rev'd per curiam*, 713 F.2d 838, 851 (D.C. Cir. 1983) (columnists' assessment of what political science profession thinks of plaintiff "implies the existence of facts inducing that conclusion * * * [with] little * * * factual predicate in the column in suit") (Robinson, C.J. concurring), *aff'd*, 750 F.2d 970, 985 n.29 (D.C. Cir, 1984) (given the court's own four-factor analysis about whether a statement is a fact or an opinion, a separate § 566 inquiry is not required), *cert. denied*, —— U.S. ——, 105 S.Ct. 2662, 86 L.Ed. 2d 278 (1985).

Several jurisdictions have agreed that although an expression of opinion based on revealed facts is not actionable, an expression of opinion based on undisclosed facts may be actionable. *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1115 (6th Cir. 1978), *cert. denied*, 440 U.S. 960, 99 S. Ct. 1502, 59 L. Ed. 2d 773 (1979) (no basis for a libel suit under § 566 because reporter accurately provided the underlying facts); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2nd Cir.) ("[o]pinions based on false facts are actionable only against a defendant who had knowledge of the falsity or probable falsity of the underlying facts") *cert. denied*, 434 U.S. 834, 98 S. Ct. 120, 54 L. Ed. 2d 95 (1977); *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d at 1358, *but see Ollman*, 750 F.2d at 984-85. The American Law Institute explains this point further:

> "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication." 3 Restatement (Second) *Torts* § 566, comment c at 173.

Applying these principles to the case before us leads to the conclusion that the trial justice was in error directing a verdict for defendant.

The unusual twist in the case before us involves an allegation of defamation not against the opinion-givers (for example, Raymond Bergeron and the sons of Gerald Lampinski) but against reporter Edward Gaulin who, plaintiff asserts, had within his knowledge certain facts that he allegedly did not disclose in the two articles at issue. Here plaintiff contends that the readers of the articles in question could reasonably expect certain undisclosed and implied defamatory facts about Dr. Healey to exist. We agree.

With regard to the first article in question, plaintiff claims that the criticism expressed by Bergeron and quoted by Gaulin in the June 24, 1980 publication implied the assertion of undisclosed facts that simply did not exist in this case and were known to the reporter not to exist. These facts are (1) Dr. Healey was requested to aid Lampinski, (2) Dr. Healey refused the request to aid Lampinski, and (3) there was sufficient time for Dr. Healey to render aid to Lampinski after the doctor learned that Lampinski had been stricken.

Gaulin testified that he had been advised by McNulty prior to going to press that there had been no request for Dr. Healey to leave the meeting to assist Lampinski. Nevertheless, by stating Bergeron's opinion critical of Dr. Healey for having failed to aid Lampinski, Bergeron's opinion suggests the assertion of the undisclosed fact that Dr. Healey had been asked to leave the board meeting for that purpose. Therefore, when the evidence is viewed in the light most favorable to plaintiff, the facts would suggest that Gaulin knew at the time that he published Bergeron's opinion that no such request for aid had been made to Dr. Healey or anyone else at the board meeting. Had Gaulin disclosed these underlying facts, Bergeron's

opinion could have been evaluated by the readers of the Times in a more objective light.

Similarly, Bergeron's criticism of Dr. Healey, as published, implied that this physician had refused to volunteer to render assistance to Lampinski. However, when the evidence is viewed in the light most favorable to plaintiff, the facts would suggest that Gaulin knew at the time that he published Bergeron's opinion that Dr. Healey neither was requested nor had refused to aid Lampinski. Indeed, plaintiff's uncontradicted testimony revealed that when Smith informed him that Lampinski had collapsed, plaintiff immediately asked Smith if he could be of any help.

Gaulin did not inform the readers of the Times that he was present at MacColl Field when Lampinski collapsed. Gaulin's presence becomes significant in light of the assertion of the third undisclosed fact, namely, that there was sufficient time to render aid to Lampinski after he had been stricken. Gaulin acknowledged under oath that approximately five to ten minutes elapsed between the time Lampinski collapsed and the time the emergency vehicle arrived at the scene. Gaulin also knew, prior to the running of the fourth edition of the story on June 24, 1980, that according to Bergeron, the board members were not informed of Lampinski's collapse for at least half an hour, at which point there was little, if any, time to render aid to him.

The defendant maintains that Gaulin understood that Bergeron's statement which was critical of the board referred only to members of the board who did not hear McNulty's first announcement to Dr. Healey and Bendl. However, the record before us seriously calls that conclusion into doubt. When this evidence is viewed in the light most favorable to plaintiff, there is the suggestion of an undisclosed defamatory fact that if plaintiff had been inclined to aid Lampinski, sufficient time existed to do so.

Although Gaulin's article of June 24, 1980, contained the caveat that Bergeron later discovered that the board of directors was not informed of Lampinski's collapse for at least half an hour, John Lampinski's outrage at the apparent callous treatment of his stricken father strongly suggests that this added fact did not settle the question of whether Dr. Healey acted in a callous and wanton manner. Accordingly, we find that Gaulin's article in the fourth edition of the Times on June 24, 1980, is capable of bearing a defamatory meaning because Bergeron's opinion may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about Dr. Healey. We also conclude that it is for the jury to decide whether more than enough facts were available to Gaulin at the time that he wrote the article of June 24, 1980, to ensure that a reasonable person could not have construed the existing facts in a manner that reflected negatively on plaintiff.

The plaintiff also asserts that the article written by Gaulin and published on June 25, 1980, suffers from the same deficiencies as the June 24, 1980 article. Here too this court finds that the readers of the article in question could reasonably have expected certain undisclosed and implied defamatory facts about Dr. Healey to exist.

John Lampinski, son of the decedent Gerald Lampinski, was not in attendance at MacColl Field on June 23, 1980. However, the article states that members of the Lampinski family were angry because they felt Lampinski should have been given early attention by either a doctor or a paramedic at the board meeting. In the next sentence, the article states, "Dr. Paul J. Healey is Y President and was at the meeting when Lampinski collapsed."

The plaintiff claims that this sentence suggests that the decedent collapsed at the meeting in the presence of Dr. Healey. If so, this would be a factual error clearly within

the reporter's knowledge prior to publication. The trial court found that the author of this article was "guilty of poor English." Moreover, the trial court found that any suggestion that Lampinski actually collapsed in the board meeting was dispelled in the next paragraph as follows:

> "Raymond Bergeron said he was standing near Lampinski when he collapsed and immediately drove from the front parking lot of MacColl Field, where Lampinski collapsed, to the board meeting about 200 yards away to get a board member, Jack Griffin, a Providence firefighter and a paramedic."

The trial court further found that "Dr. Healey could have issued a statement the following morning setting forth all the facts that were at his disposal and justified his decision not to adjourn the meeting and go tend to Lampinski." We disagree.

Although the article does later explain that Lampinski's collapse occurred about 200 yards from where the board meeting was taking place, the column may be reasonably understood to suggest the assertion of undisclosed facts that justify the expressed opinion about Dr. Healey by Lampinski's sons.

Even though it is true that when determining the meaning of a communication, one must examine all parts of the communication that are ordinarily heard or read with it, 3 Restatement (Second) *Torts* § 563, comment d at 163-64, the record contains evidence that facts surrounding the June 23, 1980 board meeting and the collapse of Gerald Lampinski existed which were not fully disclosed by the reporter in question. Lampinski did not collapse at the board meeting; no request was made to Dr. Healey to render aid to Lampinski; Dr. Healey nevertheless offered to help Lampinski but was told such help was not necessary.

The articles of June 24 and 25, 1980 were written in a manner that suggested that plaintiff had failed to aid a

person who was in need of medical attention. References to plaintiff as a doctor coupled with the criticism allegedly directed at plaintiff by Bergeron and John Lampinski, left the public to question whether Dr. Healey acted properly on June 23, 1980.

This court affirmed the trial court's granting of the defendant's motion for a directed verdict in *Hawkins v. Oden*, 459 A.2d 481 (R.I. 1983), a defamation case in which the parties had no dispute regarding the operative facts. In *Hawkins* we further stated, "Without question the 'facts' upon which the offending statements were based had been fully disclosed." *Id.* at 484. In the case before us, unlike the factual setting of *Hawkins*, there are serious factual disputes between the parties as well as a reasonable question, when the evidence is viewed in the light most favorable to plaintiff, whether the criticism directed at plaintiff in the articles at issue was based on implied undisclosed defamatory facts that in reality did not exist.

We hold, therefore, that the trial justice was in error in granting the motion for a directed verdict. Accordingly, the appeal is sustained, the judgment appealed from is vacated, and the case is remanded to the Superior Court for further proceedings.[2]

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[2] The trial justice below did not reach the issue of whether the plaintiff was a public or a private figure because the court found no defamatory statement. Hereafter, therefore, the trial court must determine, prior to sending this case to the jury, the status of plaintiff as a public or a private figure and other relevant matters incidental to this type of claim.

[Order of the State of Rhode Island and Providence Plantations Superior Court denying Defendant's Motion for a Directed Verdict and denying Defendant's Motion for a New Trial]

[Providence, Sc.

SUPERIOR COURT]

[C.A. No. 80-3101

Justice Alice B. Gibney]

[PAUL J.M. HEALEY, M.D.

v.

NEW ENGLAND NEWSPAPERS, INC.
d/b/a THE PAWTUCKET EVENING TIMES]

[June 17, 1987]

* * * *

[669] THE COURT: Now, in passing on the motion for directed verdict, as you gentlemen know, this Court must view the evidence in the light most favorable to the plaintiff, giving plaintiff all benefit of reasonable, legitimate inferences which may properly be drawn, without the Court sifting or weighing the evidence or exercising independent judgment regarding the credibility of witnesses. After doing all that, if this Court finds the existence of issues upon which reasonable people might draw conflicting conclusions, [670] the motion should be denied and the issues should be left to the jury to determine. However, if there is no conflicting evidence and

the evidence clearly shows the right of the defendant to a verdict, then the motion should be granted.

There was certainly conflicting evidence. There are certainly different interpretations on the law, including the law on this most recent Healey case. But looking at all the evidence in the light most favorable to the plaintiff, there were clearly questions that were within the purview of the jury that should have been given to the jury for that determination. And therefore, the motions are denied. The motion shall be treated as one for direction both relative to the article of the 24th as well as the article of the 25th. You certainly have a exception.

Now, that brings us to the defendant's motion for new trial. I'll hear you relative to that.

(Mr. Horan and Mr. Mahoney argued defendant's motion for new trial.)

THE COURT: Exercising my independent judgment, reviewing the material evidence in the light of the charge to the jury, passing on the weight and credibility of witnesses, I'm going to comment briefly on what I thought were the high points, if you will, of [671] this trial.

We have the testimony of the plaintiff, Healey, who testified to the facts such as he knew them, the Greene and Tillier terminations. As an aside, I would say that it seemed to me, and I'm sure it seemed to the jury, there was an undercurrent of bad feeling among a number of people who testified during the course of this case. And I assume, because I feel the jury probably did, that it emanated from that labor dispute. Essentially, the plaintiff's testimony was that thirty minutes into the meeting in question, Frank Smith came in and told him about Mr. Lampinski having collapsed, there were a couple of people administering CPR, and that the ambulance was there or it was on the way.

McNulty testified. He described Mr. Lampinski and his status that evening, or lack thereof. He stated that the firings of Greene and Tillier did not sit well with

either Mr. Lampinski or Mr. Griffin or Mr. Bergeron, that their disapproval of those firings had been voiced in the press. Although he initially stated that Lampinski was not rudely ejected and was not visibly shaken, he did concede that he was aggravated and red faced. He testified that during the course of the meeting, a police officer came to the door and beckoned to Griffin, who is a paramedic. He testified [672] that Griffin shook his head in the negative and turned back to the meeting. He testified that the officer didn't leave, and McNulty went to the officer, asked him what he wanted. The officer said he wanted Griffin, because Lampinski had collapsed. He said he spoke with Bergeron and told him that Lampinski had collapsed, an ambulance had been called, and he was receiving attention. Frank Smith passed the message at the table to Healey and Bendl. McNulty also eventually told Gaulin that it would be a terrible error to print that which was about to be printed. He told him it was a mistake.

Frank Smith testified that he was approached by McNulty while the meeting was going on, and was asked to relay a message to Bendl that Lampinski had collapsed, the ambulance called, Lampinski was being attended to, everything was under control. He crouched between Healey and Bendl to do so, and repeated it at their request. So says Smith. He testified that Gaulin asked him what had happened at the meeting, that Gaulin had heard that Smith had relayed a message to the plaintiff asking the plaintiff for help. Smith testified that he told Gaulin that that was not accurate, there was no reason for plaintiff to have done anything. Smith also eventually advised Lampinski of that, and Lampinski [673] testified that he called Smith a liar. He didn't believe him.

Now, Mr. Gaulin was a very credible witness. He was very composed. He testified that he spoke with McNulty, who told him that plaintiff and Bendl had been informed that Lampinski had collapsed, and the situation was in

hand. Gaulin never spoke to Frank Smith, but he was privy to what Smith had told McNamee. McNamee had called Smith because the paper wanted to know what message Smith had given Healey. Personally, Gaulin testified that he was standing very close to Lampinski at the time of the latter's collapse, that he heard him collapse, that he aided him, removed his false teeth, that Lampinski's breathing had stopped. CPR was administered. A fellow who identified himself as a paramedic attended to him and got him breathing again. Gaulin testified that Bergeron was very upset and left in his van. He eventually talked to an upset Bergeron, subsequent thereto called McNulty, who advised him that the officer at the meeting had asked for Griffin, who couldn't or wouldn't come, and that the message had been that there was a collapse, there was ongoing treatment, and that the ambulance was there or coming. The article was written and included criticism expressed by Bergeron, and followed by McNulty's explanation.

[674] Now, Mr. Lampinski, John Lampinski, testified to his being upset and outraged after he had received information from Bergeron and/or Griffin. Griffin had told him what had happened inside the meeting. Griffin told him that he saw Smith kneel between Bendl and Healey. Griffin told him that he didn't know what the message was. He acknowledged that he had been told by Smith that his father had collapsed, had been treated and taken away by ambulance, and that he hadn't believed Smith. Gaulin did not tell Lampinski that Gaulin was there. Gaulin did not tell Lampinski that an ambulance came within five to ten minutes. Gaulin did not tell Lampinski that CPR was administered within sixty seconds of his father's collapse.

We have the testimony of Bergeron and Griffin. Without belaboring it, the Court would note that both attested to great concern for the Lampinski family; so concerned that one sat in a van for a half hour, and the other one went to a saloon afterwards, before expressing his outrage to the deceased's family.

It was all of this testimony and all of these versions of events that the jury had to consider. And essentially, as everyone agrees, or seems to agree, the basic facts in terms of individual travel, were really not in dispute. The issue is, what was the message? [675] And what we have is a personal tragedy for the Lampinski family, the intensity of which was probably greatly enhanced by friends like Bergeron and Griffin. Griffin, among other things, testified that he took it upon himself to go to the Lampinski home, because he wanted to tell Mrs. Lampinski that, "I did the best I could to help her husband." The Court is still wondering what that statement means.

But the key issue is the newspaper article. The Lampinskis were justifiably upset, given what they had been told by Bergeron and Griffin. They had every reason to be angry and every reason to continue to feel the outrage that they apparently feel. That outrage could have been stilled by Mr. Gaulin, and it was not. He knew the facts, the immediate facts, immediately subsequent to Lampinski's collapse; and he didn't tell them. He didn't tell them, and he didn't tell the readership, and it conveyed to the Lampinski family and to the readership that there was a physician there who chose to ignore a fallen man. He wrote an article that he acknowledged had some grammatical errors. We can all live with those. But it created a perception that was clearly inaccurate, and was permitted to exist for two articles.

Now, if the evidence is such that reasonable minds [676] might differ, and as I have indicated earlier, they certainly might in this case, the jury's verdict should not be touched. If there is competent evidence to support their judgment it shouldn't be touched. I think anyone who was in the courtroom during the trial of this case would agree that this jury was an exceptionally attentive group. They obviously did not reach their decision in haste. Given the extent of the testimony, the number of people who testified, they took pains obviously to consider the testimony. There is nothing that would indicate that

they arrived at their verdict based on passion or compassion.

As to the amounts, neither is, in the Court's opinion, egregious. Both figures were responsive to the testimony. They were responsive to the issue and they were responsive to the plaintiff's allegation of his personal damages. There is no question, as defense counsel indicated, that damages in this type of a case are very difficult to assess, and I told them that in my charge. The fact that they returned at one point with a question inquiring as to readership, shows that they gave it thought. The fact that they questioned the amount of readership, the degree of readership on one particular day, shows that they gave it thought. And the testimony of Mr. Gaulin himself, as to the extent of [677] the readership, only lends more credence to the eventual verdict of the jury. As to punitive, again, not egregious, given the value of the defendant paper. The motion for new trial is denied.

I have stated to others and I will state it again, it was probably the best tried case I have ever seen. I know it's a tough one to lose, Mr. Horan, but you did a great job.

MR. HORAN: Thank you, your Honor.

THE COURT: Not that you didn't. But, I mean it's tough for him. Absolutely great case.

(Hearing concluded)

The Evening Times, Tuesday, June 24, 1980, Pawtucket-Central Falls Edition.

YMCA PROTESTER COLLAPSES AT PICKETING, DIES

By Ed Gaulin

Times staff reporter

Lincoln—Tragedy struck the already troubled Pawtucket YMCA Monday when an organizer of a protest against the firings of two employees collapsed outside the board of directors meeting being held at the Y's MacColl Field and died late Monday at Memorial Hospital in Pawtucket.

(Obituary on page 2)

Jerry Lampinski, 60, one of the founders of the Darlington Plains Outpost of the Y and for many years active in Y operations, had organized the picketing of the board of directors meeting. The protest was aimed at YMCA Director Robert C. Bendl and the board.

Lampinski was standing on a patch of grass adjacent to the front parking lot at MacColl Field, watching the protesters march, when he suddenly collapsed shortly before 6 p.m.

He was given cardiopulmonary resuscitation (CPR) by two persons who were standing nearby and was taken by Lonsdale Rescue to the hospital.

Hospital officials said he was treated in the emergency room and the coronary care center. He died at 9:44 p.m.

Frederick R. Glassman, a former YMCA board member and vice president, and a founder of the Ten Mile YMCA, said he was shocked by Lampinski's death.

Glassman said he hoped "this unfortunate incident (Lampinski's death) will serve to indicate the seriousness

of the actions that have been taking place at the Y." Glassman acknowledged that the board "may be justified in its actions," but in keeping things "under cover with no one being able to be approached," people don't have a chance to know what's happening.

Glassman said he had talked with Lampinski at MacColl Field before his collapse. Glassman said he had gone up to MacColl Field thinking it was an open meeting between the board and persons interested in what had happened the fired staffers. When he was told it was a closed session Glassman left, although he said he was invited to stay.

Lampinski was one of several Y officials who expressed outrage at the forced resignations of James L. Greene, 57, and Beverly Tillier, 37, two longtime YMCA staff members. Greene had worked closely with Lampinski in helping organize the Darlington Plains Outpost some 20 years ago.

Lampinski had threatened to seek to disassociate the Darlington Plains Outpost from the Pawtucket Y because of the firings.

The board of directors met for two-and-a-half hours in a building set at the rear of the MacColl complex. Lampinski and the demonstrators were a few hundred yeards away from the building and made no attempt to disrupt the session.

Bendl and YMCA President Paul J. Healey told a reporter after the board meeting that a statement on the firings would be released today and that a more extensive statement on the matter would be issued later this week.

But late this morning, Bendl said the Y would not comment on the situation because of the death of Lampinski. "In light of that, we will not have a statement," Bendl said today. "We certainly are saddened and feel

a sense of loss. We extend our sympathy to his family," Bendl said.

Bendl and Healey have thus far declined to discuss the firings. Healey, a surgeon, had called a press conference on the matter for last Wednesday, but later postponed it.

Raymond Bergeron, a YMCA member and a friend and supporter of Lampinski, today criticized Branch Executive Esselton McNulty and President Paul J. Healey, a surgeon, for failing to react to Lampinski's collapse.

Bergeron said he drove over to the MacColl building to inform Griffin of Lampinski's collapse, but McNulty came out of the meeting instead.

Bergeron contended that Healey, a doctor, should have gone to Lampinski's aid, and that Griffin should have been informed immediately because he was Lampinski's friend. But Bergeron said he found out later the board of directors was not informed of the situation for at least a half hour.

McNulty said today that when he was informed of the situation he immediately told both YMCA Director Robert C. Bendl and Dr. Healey. But he said a policeman on duty outside the building and Bergeron both said an ambulance had already been called. He said the policeman indicated that Lampinski was being treated.

Healey could not immediately be reached for comment.

Bendl and Healey have thus far declined to discuss the firings. Healey, a surgeon, had called a press conference on the matter for last Wednesday, but later postponed it.

Greene and Tillier had said they were called into the office of Pawtucket Branch Executive Esselton McNulty on June 6 and told to hand in their resignations—effective Aug. 1 for Greene and Aug. 22 for Tillier. They

said the reasons for the firings were budgetary and because the two did not fit into the future plans of the YMCA.

The eight picketers, employees, former employees and sympathizers, carried placards walking back and forth in front of the entrance to a parking lot adjacent to Breakneck Hill Road—some 200 yards from where the directors were meeting.

The picketing ended abruptly after Lampinski collapsed.

Lampinski had been the founder of the Darlington Plains Outpost several years ago and had worked closely with Greene since the outpost was established. Lampinski, in a strongly-worded letter to The Evening Times, had said the outpost was "considering disassociating itself" from the Pawtucket YMCA because of the firings and the cutoff of United Way funding from the Y to the outpost since Bendl took over from its former director, Raymond Larsen.

Besides the eight persons carrying placards, three or four other sympathizers stood nearby. None of the protesters made any attempt to disrupt traffic into the camp compound and no attempt was made to disrupt the board of directors meeting.

The protestors' signs asked questions such as: "Y Jim Greene, Y Bev Tillier? Y not Bob Bendl?" and "Whatever happened to the petition to oust Bob Bendl?"

Lampinski, just a few minutes before he collapsed, had attempted to attend the board meeting. He said he was told he could not attend because the session was solely for the members of the board. Lampinski is not a member of the Y board, but says he has attended meetings in the past as a proxy for Frederick Souza of the Darlington Plains Outpost who is a voting member.

Lampinski said he was told that he could not attend and vote by proxy for Souza because Souza had not authorized the proxy vote.

Lampinski, board member Jack Griffin and present and former members of the staff have been clamoring for the re-hiring of Greene and Tillier and for the ouster of Bendl.

In addition to the firings of the longtime staff members, the opponents of Bendl contend that his running of the YMCA program has resulted in decreased membership and a deterioration of the program.

Griffin has also been critical of the board of directors' decision earlier this year to take out a $400,000 mortgage on MacColl Field to fund an addition at the main branch of the YMCA for racketball courts and other improvements.

MacColl Field had been purchased during the tenure of Bendl's predecessor, Larsen, and is owned outright by the Pawtucket YMCA. The value of MacColl is believed to be more than a million dollars.

The Evening Times, June 25, 1980

Lampinski sons angry at Y board

PAWTUCKET—The family of Jerry Lampinski, who died of a heart attack Monday during a protest he organized against the Pawtucket YMCA board of directors, today expressed anger at the way their father was treated by the board.

Lampinski's son, John, of Pawtucket, said the family is upset that their father was not allowed to attend the board of directors meeting held at MacColl Field in Lincoln.

Lampinski, founder of the Darlington Plains Outpost, has attended board meetings in the past as a proxy for Frederick Souza, a board of directors member from the outpost, according to Souza.

(Frederick R. Glassman, a former Y board chairman, went to the board meeting and left after being told the meeting was closed, but said he had been invited to stay.)

Lampinski had been a leader of protests against the recent firings of two longtime YMCA staff members.

John Lampinski said he was told his father was treated rudely when ordered to leave the board meeting, and the agenda of the meeting was taken from him.

John also said the family is also angry because they feel Lampinski should have been given early attention by either a doctor or a paramedic at the board meeting.

Dr. Paul J. Healey is Y president and was at the meeting when Lampinski collapsed.

Raymond Bergeron said he was standing near Lampinski when he collapsed and immediately drove from the front parking lot of MacColl Field, where Lampinski collapsed, to the board meeting about 200 yards away to get

board member Jack Griffin, a Providence firefighter and a paramedic.

Bergeron said he was intercepted by a police guard and Esselton McNulty, branch executive of the Y, and reported Lampinski's collapse and that an ambulance had been called. (Bergeron apparently did not know it, but Lampinski was being given cardiopulmonary resuscitation at the time by a bystander who said he was a paramedic.)

According to Griffin, he was not informed of Lampinski's collapse until near the end of the two-and-a-half-hour meeting. Lampinski suffered his heart attack shortly after 5:30 p.m. Monday. The board meeting ended at about 7:30 p.m.

According to McNulty, Healey was informed that Lampinski had collapsed, an ambulance had been called and that persons at the scene were treating him.

Frank Smith, director of the Y's Camp Westwood in Coventry, said he told Healey and Robert C. Bendl, director of the Pawtucket Y, that "the situation was well in hand and already being taken care of."

Healey's office this morning said the doctor was in surgery and would be unavailable until at least mid afternoon. Healey was also unavailable when called Tuesday.

But Smith took offense at any implication that either Healey or board members had been lax.

"Look, the accusation being made is false, the accusation that Dr. Healey knew something and didn't do anything," Smith said.

The Evening Times, June 27, 1980

THE TIME IS NOW FOR EXPLANATION

Three weeks ago today, two long-time employees of the Pawtucket YMCA were, in effect, fired. They were ordered to hand in their resignations—one effective Aug. 1, the other effective Aug. 22.

Since then, there has been a storm of protest. Petitions have been circulated protesting the firings, board of director meetings have been picketed, at least one paid staff member resigned in protest, several unpaid voluteers have reportedly resigned, also to protest what is taking place.

Jerry Lampinski, a man who helped found the Darlington Plains Outpost of the Y about 20 years ago with one of the long-time staffers whose resignation has been demanded, organized a group of pickets to protest at a Monday meeting of the board of directors of the Y. As he watched the pickets Monday afternoon, he collapsed. Later that day he died, the victim of a massive heart attack.

Throughout all this executives and directors of the YMCA have remained silent. There has been no official explanation of why the resignations of the two employees have been demanded. One said he was told it was because of the "budget" and that he didn't fit into plans for the new direction the YMCA was taking. The other said the reasons given to her were unspecific.

Paul J. Healey, a surgeon and president of the YMCA, called a press conference for June 18 then canceled it because there was an unscheduled operation he had to perform. Healey and Robert C. Bendl, director of the YMCA operations in the Pawtucket area, then said they would issue a statement Tuesday. Out of respect to Mr. Lampinski, they said the day after the man died, a

public explanation of the firings would be further delayed. No new date has been set for the public to gather further information from either or both of the men.

There are people in the area who are interested in joining the YMCA to take advantage of new programs, such as the racquetball courts now under construction. They would like to know what is happening and why.

There are long-time members of the YMCA who use the facilities on Summer Street on almost a daily basis—some of whom have stopped going because of the controversy—who are also asking questions. They, too, would like to know what is happening and why.

Jerry Lampinski, a member of the board of directors of the Darlington Plains Outpost, was, in the words of his sons, rudely ejected from that YMCA board meeting Monday. He had been a leading critic of the firings so the reason directors did not want him at the meeting is obvious. But he, too, wanted to know what is happening and why.

And the time is long past due when Dr. Healey and Mr. Bendl level with the public and let them know what is happening and why. If it is simply a matter of brushing aside long-time employees to bring in people more acceptable to the director, then it can easily be assumed the people of Pawtucket who have long worked with James L. Greene and Beverly Tillier will find the situation unacceptable.

If there are other reasons, then it is time YMCA executives and board members speak up.